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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ROBERT S. DOBKIN, DONALD I. DOBKIN, and ROSALYN DOBKIN,

Petitioners,

v.

THE JOHNS HOPKINS UNIVERSITY, ESTELLE FISHBEIN and PEARL GERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Vice President and General Counsel and the chair of an interdepartmental program at a major research university, to whom Congress, and the National Institutes of Health/National Institute on Aging have delegated the authority to allocate public monies to fund scientific research, are limited purpose public figures in a defamation action challenging statements regarding the integrity and good faith of their exercise of that authority.

2. Whether the court of appeals misconstrued this Court's ruling in *McDonald v. Smith*, 472 U.S. 479 (1985), as mandating that petitions to government officials, of and concerning persons held to be private figures, are subject only to the lesser defense of mere negligence, the federal minimum standard of fault under *Gertz v. Robert Welch*, 418 U.S. 323 (1974), rather than to otherwise applicable (and in this case under Maryland law substantially more protective) state common law privilege.

3. Whether, in assessing a professor's statement defaming a student under the conditional privilege protecting such academic assessment, the district court may grant summary judgment for the professor solely on the ground that it credits the professor's and rejects the student's account of the disputed events at issue, in violation of this Court's mandate in *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986), that a court, on a motion for summary judgement, may not make credibility determinations.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Robert S. Dobkin was plaintiff-appellant and counterclaim defendant-appellant in the United States Court of Appeals for the Fourth Circuit. Petitioners Donald I. Dobkin and Rosalyn Dobkin, parents of Robert S. Dobkin, were parties in interest and crossclaim defendants-appellants in the Court of Appeals. The Johns Hopkins University, Estelle Fishbein, Pearl German and Judith Kasper were defendants-appellees in the Court of Appeals. Judith Kasper is not a party to this petition. The Johns Hopkins University, Estelle Fishbein, and Pearl German were plaintiffs-appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Robert Dobkin and his parents, Donald and Rosalyn Dobkin, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the court of appeals (*infra*, Pet. App. 62a) is not reported. The opinion of the district court denying petitioners' motion for summary judgment (*infra*, Pet. App. 32a) is also unreported. An earlier opinion of the district court, denying the motion of respondents and others to

dismiss the complaint for failure to state a claim, is also unreported, and appears *infra*, Pet. App. 8a.

JURISDICTION

The decision of the court of appeals was entered on January 21, 1999. A timely petition for rehearing was filed on February 3, 1999, and denied on March 22, 1999. On June 14, 1999, the Chief Justice extended until July 20, 1999, the time for filing a petition for writ of certiorari. See application No. A-1043. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. 1., Pet. App. 1a.

The provisions of 42 U.S.C. § 288 are set forth in the appendix, Pet. App. 1a-6a.

STATEMENT OF THE CASE

The central question in this case is whether delegatees of Congress's spending power, who are authorized to distribute public monies, are limited purpose public figures in a defamation action they have brought challenging statements made regarding their exercise of this public power. The lower courts are deeply divided on the circumstances under which a person may be a limited purpose public figure, in defamation actions regarding their exercise of a public power, and in particular regarding the exercise of the power to allocate public monies. Yet these questions arise with great frequency in defamation cases. For the reasons set forth below, this Court's review is necessary to resolve that important and recurring question of First Amendment law.

Had the courts below properly ruled on respondents-plaintiffs' status as public figures, there would have been no question but that their claims could not have been pursued in

the absence of proof of "actual malice," as defined under *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) — the same high standard of fault applied as a matter of state common law privilege in favor of the respondents as defendants in granting them summary judgment on Robert Dobkin's claims of defamation. Unfortunately, the courts below also erroneously rejected the Dobkins' alternative argument that, under the doctrine of *McDonald v. Smith*, 472 U.S. 479 (1985), their petitions for redress of their grievances regarding federally-funded educational grants required application of the same common law actual malice privilege. While this Court's holding in *McDonald* is not entirely free from ambiguity, as evidenced by some confusion among those commentators and courts that have attempted to interpret and apply it, the lower courts in this case unquestionably misread *McDonald* when they concluded that it mandated application of a standard of fault *less protective* than the otherwise applicable state common law privilege, thereby effectively leaving the Dobkins worse off for having asserted a privilege claim under the Petition Clause. Having undertaken in *McDonald* to clarify that the Petition Clause provides no *greater* protection from claims of defamation than the doctrine of *New York Times v. Sullivan*, this Court should hasten to clarify that invocation of the Petition Clause should not be misread as mandating a *lesser* standard of protection than would otherwise be available under state law.

Finally, the lower courts in this case also presumed to grant and affirm summary judgment for defendants, in a defamation claim brought by a student against his former professors, on the basis of the courts' own assessment of the credibility of the participants' accounts of the events in certain allegedly defamatory statements made by the professors regarding the student. On this issue as well the lower courts are divided: some scrupulously refuse to assess credibility themselves, while others, including the court below, venture to dispose of cases on the basis of their own credibility judgments. While this Court has from time to time endeavored to clarify the circumstances under which a court's credibility judgments may serve as the basis for summary judgment in defamation cases, the lower courts' continuing disagreement

regarding the application of these holdings makes it necessary for this Court to revisit this issue.

A. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

After graduating in 1986 from Yale University's School of Medicine with a Master of Public Health degree in Chronic Disease Epidemiology and Public Health, Robert Dobkin was accepted by the School of Hygiene and Public Health at defendant Johns Hopkins University ("Hopkins"), and he matriculated there in 1990 as a graduate student seeking a Doctor of Public Health degree and a certificate in Gerontology. Respondents conferred upon Dobkin public grants, funded by the National Institutes of Health and the National Institute on Aging ("NIH/NIA") to pay Dobkin's tuition and the costs of his related research. These grants were administered by Hopkins officials, including respondents, acting under authority delegated to them by NIH/NIA. *See* 42 U.S.C. § 288(a)(1)(B), 42 C.F.R. § 66.204 et seq.

After Dobkin's relationship with his advisor (respondent Dr. Pearl German) deteriorated, German — exercising the power delegated to her under Section 288(a)(1)(B) —terminated Dobkin's NIH/NIA grant. In the course of so doing, and in the course of justifying this decision, respondents German and Fishbein made a number of false statements regarding Dobkin. Among these, and at issue in this case, are three false statements that had nothing directly to do with the quality or substance of Dobkin's work at Hopkins: respondents German or Fishbein falsely claimed to a number of individuals (a) that Dobkin had misrepresented his medical history — falsely claiming he had had cancer when he had not; (b) that he had exposed himself to respondent German; and (c) that he constituted a danger to others because he was likely to physically attack them. Significantly, these assertions made their way into Dobkin's records at the NIH, where they remain, immune to refutation, to this day.

Dobkin and his parents attempted to challenge the decision to terminate his grant, both within the University and, when that failed, outside it. They believed that the Hopkins'

decision makers who had revoked his federal grants had acted *ultra vires* for improper reasons; and that they had justified such action to others by making the false statements described above. When their efforts to correct the decision within Hopkins failed, they voiced this belief in letters to Vice President-elect Al Gore, to First Lady-elect Hillary Rodham Clinton, and to Senator Robert Dole, as well as to presidential candidate H. Ross Perot and columnist Thomas Sowell. In particular, they claimed that respondents' actions had been animated by fraud because of respondents' knowingly false statements regarding Dobkin.

When these extra-mural efforts failed, Dobkin sued Hopkins and Hopkins officials Estelle A. Fishbein (Hopkins Vice President and General Counsel) and Dr. Pearl German (Dobkin's former advisor), claiming, *inter alia,* that statements each had published regarding him were defamatory and made with actual malice. Fishbein and German responded by suing Dobkin and his parents, claiming that their pleas for help to Mrs. Clinton, the Vice President, Sowell and Perot were defamatory.

B. The Decisions Below

The district court granted summary judgment against Dobkin on all of his claims. On his defamation counts it held that all of the statements at issue were conditionally privileged under state common law by virtue of the speakers' responsibility to administer the NIH/NIA grant program — and therefore that Dobkin could prevail on his defamation claim only by showing actual malice. This conditional privilege was said to protect the speaker even though the statements at issue bore only on Dobkin's action in allegedly exposing himself, or his reputation for veracity or violence outside of the context of his University work, and did not relate in any way to the quality or nature of the work he was doing at Hopkins, and with respect to which the speakers were authorized to take official action affecting Dobkin. Pet. App. at 39a-51a.

On the merits of the claim, the district court simply assessed the parties' credibility on its own, concluded that Dobkin's version of the defamatory statements was inaccurate, and rejected his claim. With respect to German's published statement that Dobkin had exposed himself to her, the district

court focused not on whether respondent German had actually accused Dobkin of such conduct, but exclusively on the question whether German had described the alleged incident as "sexual harassment" (of her by Dobkin). Concluding – on the basis of its own credibility determination – that she had not so described Dobkin's action, the district court granted German's motion for summary judgment on this claim.

The district court denied the summary judgment motion filed by Donald and Rosalyn Dobkin on Fishbein and German's defamation claim. Pet. App. 53a-59a. Although it found that "[t]he scope of [this Court's decision in] *McDonald [v. Smith,* 472 U.S. 479 (1985)] is unclear," Pet. App. 55a, the district court rejected the Dobkins' claim of conditional privilege under the Petition Clause of the First Amendment. The district court held that neither Fishbein nor German was a public figure of any kind and that there was no public issue or controversy with respect to Hopkins's administration of the NIH/NIA grant program, discussed in the letters to Mrs. Clinton, Vice President Gore, Sowell or Perot. *Id.* at 31-32. A subsequent trial on Fishbein's and German's defamation claims, in connection with which the jury was permitted to award damages against the Dobkins based on proof of mere "negligence," resulted in a verdict in Fishbein's and German's favor.

Robert Dobkin and his parents appealed, and the court of appeals affirmed in all respects in a brief unpublished opinion. Pet. App. 62a-72a. Relying to a significant extent on the district court's summary judgement opinion, the Fourth Circuit expressly rejected the Dobkins' First Amendment argument that the statements by the individual Hopkins defendants were actionable because they involved a public issue (the integrity of the administration of federal grant programs) and because the people whose actions were at issue – the delegatees of power over these public funds – were limited purpose public figures. Pet. App. 70a-71a. The court of appeals decision on this issue is quite brief, however, and includes little more than the statement that no public question is at issue. *Ibid.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MAGNIFIES AN EXISTING DISAGREEMENT AMONG THE LOWER COURTS REGARDING ENTITLEMENT TO THE ACTUAL MALICE STANDARD IN DEFAMATION CASES CHALLENGING STATEMENTS REGARDING THE ALLOCATION OF PUBLIC RESOURCES

This Court's opinions in *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 167-68 (1979); *Hutchinson v. Proxmire,* 443 U.S. 111, 134-36 (1979); *Time, Inc. v. Firestone,* 424 U.S. 448, 454 (1976); and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 346 (1974), establish two principles governing the determination whether a defamation plaintiff is a limited purpose public figure: A public controversy of some kind must exist; and the plaintiff must be involved in some way in that public controversy.

Beyond their common recitation of these rules, however, the lower courts are agreed on little regarding the definition and application of either of these requirements. The D. C. Circuit, in a 1980 case, quoted quite recently in a defamation treatise, noted that this Court "has not fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz." Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287, 1292, *cert. denied,* 449 U.S. 898 (1980), quoted in Rodney A. Smolla, THE LAW OF DEFAMATION, § 2.09[1] at 2-29. The result has been a wide range of inconsistent approaches, in which some lines of cases governing the same single issue do not even intersect with one another.

A. Some cases have determined the applicability of the actual malice standard by focusing simply on the "status of the plaintiff," *Lewis v. Elliot,* 628 F. Supp. 512, 521 (D.D.C. 1986), and in particular on the scope of plaintiff's authority to allocate public resources. Thus, for instance, in *Elliot* the court held that a federal civil servant was a limited purpose public official with respect to statements about his exercise of control over certain of the government's purchases — and this for the simple reason that "the plaintiff had, or was perceived to have, power over the awarding of government contracts. The [alleg-

edly defamatory statements] related to the conduct of his official duties and referred to a specific federal statute which circumscribed his conduct." 628 F. Supp. at 521 (citations omitted).

In *Grossman v. Smart*, 807 F. Supp. 1404 (C.D. Ill. 1992), the court faced a defamation claim brought against a professor of law and the Vice Chancellor for Research at the University of Illinois, regarding statements the two had made while on a Search Committee and evaluating a possible new hire. The Court held that – solely by virtue of "[t]he authority vested in these high level positions," the plaintiffs were public figures who could prevail in a defamation claim only by proving actual malice. Similarly, in *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562 (Ariz. 1986), the Arizona Supreme Court held that a privately employed insurance broker was a limited purpose public figure solely because he had taken on the role of authorized agent for the sale of insurance to a county's public employees.[1] *See generally* 4 Ronald D. Rotunda and John E. Nowak, TREATISE ON CONSTITU-

1. A great many cases use the same approach in determining whether public school teachers and officials are public figures by virtue of their positions. The cases seem to split almost evenly on the question. *Compare Abdelsayed v. Narumanchi*, 39 Conn. App. 778, 668 A.2d 378 (1995) (college professor is public figure); *Purvis v. Ballantine*, 226 Ga. App. 246, 487 S.E.2d 14 (1997) (superintendent is public figure); *Byers v. Southeastern Newspaper Corp. Inc.*, 161 Ga. App. 717, 288 S.E.2d 698 (1982) (college dean is public figure); *Johnson v. Board of Jr. College Dist.*, 31 Ill.App.3d 270, 334 N.E.2d 442 (1975) (professors in controversy over of text book selection are public figures); *Walko v. Kean College*, 235 N.J.Super. 139, 561 A.2d 680 (1988) (assistant dean is public figure); *with Stevens v. Tillman*, 568 F. Supp. 289 (N.D. Ill. 1983) (principal is not public figure); *Franklin v. Benevolent and Protective Order of Elks, Lodge No. 1108*, 97 Cal.App.3d 915, 924, 159 Cal-.Rptr. 131 (1979) (teacher did not become public figure by selecting text book or in participating under regulations in investigation); *Ellerbee v. Mills*, 262 Ga. 516, 422 S.E.2d 539 (1992) (principal neither public official nor public figure); *Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 297 Ill. App. 3d 304, 696 N.E.2d 761 (1998) (teacher is not public figure); *McCutcheon v. Moran*, 99 Ill.App.3d 421, 425 N.E.2d 1130 (1981) (principal is not public figure); *Ramirez v. Rogers*, 540 A.2D 475 (Me. 1988) (operator of private gymnastics school is not public figure); *East Canton Educ. Ass'n v. McIntosh*, 85 Ohio St.3d 465, 709 N.E.2d 468 (1999) (teacher is neither public official nor public figure).

TIONAL LAW § 20.33 (2d ed. 1992) (any government employee holding discretionary power in matters of public interest qualifies as a public figure for defamation purposes).

Had the Fourth Circuit applied this approach it would clearly have held respondents were limited purpose public figures with respect to their exercise of power over the allocation of public research monies. The relevant provisions of NIH's organic legislation authorize that agency to delegate to private institutions the authority to allocate the very considerable sums of public monies for research and the funding of individual educations.[2] *See* 42 U.S.C. § 288(a)(1)(B); 42 C.F.R. § 66.205. As the district court noted in an early ruling in this case, this system was not created simply for the private purpose of paying the tuition bills of private citizens: "Congress did not appropriate hundreds of millions of dollars to subsidize individual educations; instead, the intended beneficiary of the [grants made pursuant to the program that funded Dobkin's tuition and research] is the American public." District Court opinion of Jan. 25, 1994, Pet. App. 21a.

It was this public power that respondents were exercising when they terminated Mr. Dobkin's grant, and in the exercise of which they made — and published to the academic community and to the NIH — the defamatory statements here at issue. Had the Fourth Circuit correctly assessed the public quality of respondents' role by reference to the extent of the public power they wielded, it would have reached the opposite result — but the correct result — in this case.

B. An alternative line of cases defines the plaintiff's status as a limited purpose public figure by reference to a series of factors, varying across jurisdictions, designed to assess whether the plaintiff has inserted himself with the requisite degree of voluntariness into a controversy which is sufficiently "public." Yet the differences among the circuits are not limited

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2. Extraordinary sums of money are involved. According to U.S. News and World Report, for example, in 1998 NIH funding of medical schools alone exceeded $1 billion even considering only the funds allocated to the top five grant recipients. Hopkins' medical school received over $228 million. *See* U.S. News Online, 2000 Graduate School Rankings — Medicine <http://www.usnews.com/usnews/edu/beyond/gradrank/med/gdmedt1.htm>.

to their enunciation of different multi-factored balancing tests; these differences are also animated in part by different judgments regarding how to measure the extent to which a controversy is "public."

The Fourth Circuit, in a line of cases culminating in *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (1994), has applied a restrictive test that precludes a matter from being a public controversy unless "its ramifications will be felt by persons who are not direct participants." Invoking a quote from *Foretich* and without any explanation, and contrary to the holdings of the courts discussed above, *see, supra,* at p. 7-9, the court of appeals held here that a person is not a limited purpose public figure even when that person exercises authority over the expenditure of public money, and even when the statements at issue concern precisely the defamation plaintiff's exercise of this public power.[3]

This crabbed reading of the matter at issue fails to properly appreciate the statements' context — as is apparent from cases like *Lewis v. Elliot, supra,* in which the only allegations actually made in the assertedly defamatory statement related to whether a specific procurement official had a conflict of interest with respect to a particular transaction. Yet the district court in that case had no difficulty realizing that, for purposes of determining the public nature of the controversy, the question "was the ethics of a government employee and thus his fitness for office. This subject matter is quintessentially one of public concern." 628 F. Supp. at 521.

Exactly the same kind of reading employed in *Lewis* could have been applied here: the district court and the court of appeals could have chosen to recognize that the Dobkins'

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3. The lack of explanation is not at all unusual. One commentator has noted that "[a]pproximately four-fifths of the decided cases may properly be classified as ad hoc because they fail to articulate any rule of decision applicable to future public controversy questions." Note, *Defining a Public Controversy in the Constitutional Law of Defamation* , 60 VA. L. REV. 931, 944 n. 77 (1983). The decision below fits in this large category: its discussion of the issue consists entirely of a quotation of *Foretich's* rule that the controversy must have "ramifications [which] will be felt by persons who are not direct participants," followed by the simple statement that "[t]he termination of Robert Dobkin's grant is not a 'public controversy.'" Pet. App. 71a.

statements regarding respondents related not only to whether Mr. Dobkin's grant should have been terminated but to whether respondents had exercised their power over grants properly or faithfully, and in particular whether they were cutting off a grant because of actual concerns about the quality of a student's work, or, with demonstrably false cover stories, and for improper reasons, unrelated to the quality of that work, reflected in the deterioration of Dobkin's relationship with his advisor. And of course, if Dobkin's allegations regarding respondents' defamatory statements are true, then their exercise of power over his grant was clearly irresponsible.

A more complete assessment of the context of the controversy at issue was also employed by the court in *Tarkington, O'Connor & O'Neill v. Fireman's Fund Insurance Co.*, No. A077091 (San Francisco Cty Superior Ct. No. 958950) (June 17, 1998) *petition for review denied*, Sept. 30, 1998, *cert. denied*, ___ U.S. ___, 119 S. Ct. 1335 (1999). There the court found that potentially fraudulent "attorney billing practices" in private litigation "are a public issue." Slip op. at 15. Similarly, in *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 377 (1996), the court held that an issue is a matter of public interest if it relates to a public "decisionmaking process" and if 'the dispute which provides the context for the statements" has "potentially" serious impact on members of the public. Accordingly, if a private professional licensed by a public authority commits an act worthy of report to the public licensing agency, that fact is itself sufficiently "public" to constitute a public controversy. *See ibid.* ("[t]he fact that the City (via certain of its employees) believed respondents' surveys were sufficiently defective to warrant reporting them to the State of California's licensing board, the Board of Engineers, bespeaks the public nature of the survey dispute" because '[m]embers of the public have an interest in matters which affect their role as consumers.' " quoting *Paradise Hills Associates v. Procel*, 235 Cal. App. 3d 1528, 1544 (Cal. App. 1991).

C. Petitioners submit that an additional factor is at work underlying the court of appeals' decision that no matter of

public controversy was at issue here, and that the Hopkins officials carrying out the public function of allocating public funds are nonetheless not even limited purpose public figures. That is a traditional – but increasingly discredited – judicial reluctance to question academic decisionmaking of any kind.

As recently as the end of World War II the actions of academic institutions such as Johns Hopkins, and of employees acting on behalf of such institutions, enjoyed virtual immunity from judicial scrutiny. Colleges and universities regarded themselves as "removed from and perhaps above the world of law and lawyers." William A. Kaplin and Barbara A. Lee, THE LAW OF HIGHER EDUCATION 4 (3d ed. 1995) (hereinafter "*Kaplin and Lee*") For their part, courts granted extraordinary deference to the actions of academic institutions, in part because such action was thought to involve specialized judgments too arcane and delicate to permit judicial intervention and in part because such judgments were thought to arise in a world in which "ill will and personal bias were strangers" and that did not, therefore, have any need for the corrective scrutiny of the courts. *Id.* at 5. *See, e.g., Faro v. New York University,* 502 F.2d 1229, 1231-32 (2d Cir. 1974) ("[O]f all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level are probably the least suited for federal court supervision").

"Since the mid-twentieth century, however, events and changing circumstances have worked a revolution in the relationship between academia and the law" as "courts have become more willing to entertain . . . suits on their merits and to offer relief from certain institutional actions." *Kaplin and Lee* at 6-7. One factor that led courts to take a more active role in adjudicating disputes was the recognition that not all decision-making by academic faculties and administrators was free from "ill will and personal bias." *Kaplin and Lee at 5.* As the Second Circuit explained in its rejection of this approach in *Powell v. Syracuse University,* 580 F.2d 1150, 1153 (2d Cir. 1978), the courts' "anti-interventionist policy has rendered colleges and universities virtually immune to all charges of," for example, "employment bias".

Other courts became equally vigilant, prompted by the same insight and judicial principle as motivated the Second Circuit in *Powell, supra. See,* e.g., *In re Dinnan,* 661 F.2d 426 (11th Cir. 1981) and *EEOC v. Franklin and Marshall College,* 775 F.2d 110 (3d Cir. 1985), both of which require members of tenure review committees to disclose and explain the grounds upon which they relied in rejecting tenure applications by junior faculty members. Nine years of uncertainty followed the holding in *Dinnan, supra,* however. The Second Circuit, despite its own recognition of the evil consequences that arise from grants of immunity from judicial review, limited the right of faculty members to learn the truth of the grounds relied upon by academic committee members in rejecting their applications for promotion and tenure. *See Gray v. Board of Higher Education,* 692 F.2d 901 (2d Cir. 1982). The Seventh Circuit in *EEOC v. University of Notre Dame,* 715 F.2d 331 (1983), rejected that right entirely.

It took this Court's important and unanimous decision in *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990), nine years after *Dinnan,* to establish the importance of that right to society at large, as well as to aggrieved faculty members, and to instruct the lower courts, the academy, and academic faculties that henceforth the way to defeat claims of "bias or unfairness" in academic decisions must be decisions grounded in "specific examples and illustrations," 493 U.S. at 200, not refuge behind a screen of confidentiality or academic "privilege."

The issues raised in this appeal go to the heart of the obligation of universities, and particularly research universities such as Johns Hopkins, to exercise a responsible stewardship in their increasingly extensive administration of the vital biomedical research that they carry out, often (as here) in collaboration with governmental institutions and supported by public funds. As Kaplin and Lee noted in 1995 (*op. cit.* at 945), the issues created by that stewardship have been the focus of enormous attention since university collaboration in outside research efforts assumed extraordinary importance to the public in the early 1970's. Congressional committees, the courts, and private commentaries have all focused attention on the

importance of this collaboration to society, on the one hand, and on the need for careful, independent scrutiny of its administration on the other. *Ibid.*

In this appeal it is precisely the nexus between the legal obligations incurred by universities, on the one hand, when they undertake to act as stewards of public funds and research managers and, on the other hand, the as-yet unsettled criteria for a defendant's invocation of the "public figure" doctrine, that is fundamentally at stake, in the context of the socially important task of public health research and policy formation.

The disparate analyses of the circuit courts in applying the public figure doctrine in the academic context, and in particular the disparate criteria used in that context to determine who is and who is not a public figure, obliged to suffer with more limited judicial redress the "vehement, caustic, and sometimes unpleasantly sharp attacks" to which the First Amendment subjects public figures, makes apparent the need for further guidance from this Court. Thus in *Avins v. White,* 627 F.2d 637 (3d Cir. 1980), the dean of a private law school was held to be a public figure. In *Johnson v. Lincoln University,* 776 F.2d 443 (1985), the Third Circuit held that it was "hardly open to question" that remarks by Johnson dealing with the internal academic standards applied at Lincoln University, to which the University objected and for which it sought to terminate his appointment, "touch[ed] upon matters of public concern." *Johnson,* 776 F.2d at 452.

The standard applied by the Fourth Circuit in rejecting Dobkin's appeal of the District Court's order is strikingly different from that of the Third Circuit and from the spirit of this Court's public figure cases. By entirely ignoring the context of respondents' defamatory statements — that is, by ignoring the fact that they were made about people allocating public monies, and that the statements bear directly on the fidelity with which respondents were carrying out that public function — the Fourth Circuit's standard fails to provide the protection for "the essence of self-government" required by, e.g., this Court's decision in *Garrison v. Louisiana,* 379 U.S. 64 (1964). It also, and for that reason, leaves academic officials to whom power has been delegated over public research funds free to hide

behind the protection of the sort of immunity that the courts, including this Court, have found to be so harmful to society.

D. Other courts have taken significantly different approaches to the remaining factors determining whether an allegedly defamatory statement related to a public controversy. The Sixth Circuit, for example, has held that a public controversy is to be assessed, to determine whether a defamation plaintiff is a limited purpose public figure, by examination of the following three factors: the extent to which the plaintiff's participation in the controversy is voluntary; the extent to which the plaintiff has access to channels of effective communications to counter the false defamatory statements; and the prominence of the role played by the plaintiff.

The Second Circuit, by contrast, in *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (1984), *cert. denied*, 471 U.S. 1054 (1985), enunciated four factors a defendant must show are present to avoid the negligence standard applicable in defamation claims by private figures: the plaintiff must "successfully invite public attention to his views in an effort to influence others prior to the incident that is the subject of the litigation; the plaintiff must have voluntarily injected himself into a public controversy related to the subject of the litigation; the plaintiff must have assumed a position of prominence in the public controversy; and maintained regular and continuing access to the media. In the face of these conflicting tests and others, the Fifth Circuit some years ago essentially threw up its hands, and invoked a rule which has at least the virtue of easy statement: "although the public figure concept has evolved a truly working definition, it falls within that class of legal abstractions where 'I know it when I see it,' in Mr. Justice Stewart's words." *Romanov v. Playboy Enters.*, 580 F.2d 859, 861 (5th Cir. 1978).

E. With holdings like this, the contention that the law in this area is disordered becomes a matter susceptible of easy proof. It is also relevant, however, that this case provides a useful and efficient vehicle for resolution of these disagreements. The line of cases allowing public figure status to turn on the plaintiff's control over the allocation of public resources would, if applied here, require reversal. Even if that

rule is rejected, this Court's assessment of the Fourth Circuit's refusal to assess the context of the dispute here at issue, and the implications for other people of the allegations made in the assertedly defamatory statement, will enable it to clarify the extent to which these matters must be put in issue by the speaker in the statements. Petitioners submit that the need to consider the context and implications of a statement requires that the court reviewing the statements pose for itself the question whether the conduct charged in those statements would, if generally engaged in, significantly affect the public. That is clearly the approach taken by the courts in *Tarkington, O'Connor & O'Neill* and in *Nizam-Aldine.* It is not the approach taken by the court below.

II. ALTHOUGH THE OTHERWISE APPLICABLE MARYLAND STATE COMMON LAW PRIVILEGE WOULD HAVE REQUIRED PROOF OF "ACTUAL MALICE" AS DEFINED UNDER *NEW YORK TIMES CO. v. SULLIVAN,* THE COURTS BELOW MISCONSTRUED THE DOCTRINE OF *McDONALD v. SMITH* TO MANDATE ONLY A "NEGLIGENCE" DEFENSE FOR THE DOBKINS, THE FEDERAL MINIMUM STANDARD OF FAULT UNDER *GERTZ v. ROBERT WELCH, INC.*

In *McDonald v. Smith,* 472 U.S. 479 (1985), this Court was called upon "to decide whether the Petition Clause of the First Amendment provides absolute immunity to a defendant charged with expressing libelous and damaging falsehoods in letters to the President of the United States"[4] Although recognizing "the values in the right of petition as an important aspect of self-government," this Court found no basis in history or in policy for recognizing an *absolute,* as opposed to a *qualified,* privilege inherent in the Petition Clause. The Court also reasoned that to recognize an absolute immunity "would elevate the Petition Clause to special First Amendment sta-

4. In *McDonald,* some of the letters at issue were written to Ronald Reagan when he was President-Elect. This Court drew no distinction between President Reagan's status before or after his inauguration. Here, the letter to Al Gore was written when he was Vice President-Elect.

tus," holding that "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than to other First Amendment expressions."

On that basis this Court held that, since under the applicable state common law (of North Carolina) the petitioner must be shown to have acted with " 'malice' . . . in terms that court considered consistent with *New York Times Co v. Sullivan* . . . . [w]e hold that the Petition Clause does not require the State to expand this privilege into an absolute one."

It is not clear from Chief Justice Burger's opinion for the Court whether the holding of *McDonald* is limited simply to the negation of any special claim for absolute immunity under the Petition Clause as a matter of federal right, in circumstances where the Court was also satisfied on an *ad hoc* basis that the petitioner was reasonably protected under available state common law, or whether *McDonald* should be read as creating an affirmative obligation upon the states to provide a qualified privilege to petitioners of government at least arguably equivalent to that provided by *Sullivan*.[5]

Commentators and the lower courts have been divided on the issue. According to Professor Rodney Smolla, in his leading treatise, in *McDonald* this Court "rejected the defendant's claim of absolute immunity, holding that *the first amendment merely imposes an obligation on a state to provide qualified immunity for such communications.* Under North Carolina's common law, an actual malice standard equivalent to *New York Times* protection was required to defeat the privilege,

5. Chief Justice Burger's opinion was written for himself and five other members of the Court. Justice Brennan wrote a concurring opinion, for himself and Justices Marshall and Blackmun, also joining in Chief Justice Burger's opinion for the Court. Justice Brennan's reasoning suggests that he viewed the majority's holding as affirmatively mandating application of the *Sullivan* actual malice standard as a matter of federal constitutional law. According to the Brennan concurrence, "[t]here is no persuasive reason for according greater or lesser protection to matters of public importance," regardless of the context of the expression, including petitioning activity of the kind presented in *McDonald.* "It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in *New York Times Co. v. Sullivan*, is not shielded by an absolute privilege."

and the Supreme Court held that North Carolina's common law satisfied the demands of the first amendment." Rodney A. Smolla, LAW OF DEFAMATION, § 8.08 [2][e] at 8-28 (1994) (emphasis added; footnotes omitted).

On the other hand, in their authoritative treatise Judge Robert Sack and Sandra Baron concluded that in *McDonald* this Court "neither expressly endorsed [the North Carolina 'malice' standard] nor mandated any specific standard. It simply concluded that the right to petition does not require an absolute privilege." R. Sack and S. Baron, LIBEL, SLANDER AND RELATED PROBLEMS, § 7.3.6 at 462 (2d ed. 1995) (footnote omitted).

Several cases have viewed *McDonald* as largely deferring to state common law privileges, some of which actually provide *greater* protection than the qualified immunity accepted in *McDonald.* For example, and ironically, on remand from this Court's decision in *McDonald* the Fourth Circuit ultimately reversed a jury verdict in favor of the plaintiff on the ground that, under North Carolina law, the statements at issue were *absolutely* privileged as statements made in the course of a quasi-judicial proceeding. *Smith v. McDonald,* 895 F.2d 147 (4th Cir. 1990). Similarly, in *Miner v. Novotny,* 304 Md. 164, 498 A. 2d 269 (1985), the Maryland Court of Appeals held that statements which under *McDonald* would have been only *qualifiedly* privileged as petitioning activity[6] were also *absolutely* privileged as statements made in the course of administrative proceedings. And in *Webster v. Sun Company, Inc.,* 790 F.2d 157 (D.C. Cir. 1986), the D.C. Circuit rejected an argument that it would be "anamolous" for a common law privilege "to afford a greater degree of protection than a constitutional privilege," and authorized the application of a common law absolute privilege to certain petitioning activity, holding that "[t]he Constitution sets out the minimum protection

6. The Maryland Court of Appeals in *Miner* expressly overturned two prior Maryland cases, and the decision of the intermediate appellate court in that case, to the extent that, under *McDonald,* they had overbroadly construed the First Amendment right to petition as requiring recognition of an *absolute* privilege.

for First Amendment rights, but it does not prohibit state law from providing a higher level of protection." *Id.* at 162.

On the other hand, other courts have expressed some degree of confusion and uncertainty, or at least differing views, as to whether and to what extent the constitutionally-based standards of *Sullivan* and *Gertz* interact with, or perhaps might even be substituted for, common law privileges under authority of *McDonald. See Lewis v. Elliot,* 628 F. Supp. 512 (D.D.C. 1986)(discussing but not resolving questions as to the interaction between *McDonald, Sullivan, Gertz* and common law privilege under state law); *Richmond v. Thompson,* 130 Wash. 2d 368, 922 P.2d 1343 (1996) (holding that "the proper standard under the petition clause *must be* the *New York Times* qualified privilege" (emphasis added) while also observing that "[t]he nature of the communication, to whom it was sent, and the status of the parties played no part in the [*McDonald*] decision." 130 Wash. at 379.

In *In Re: IBP Confidential Business Documents Litigation,* 797 F.2d 632 (8th Cir. 1986), the court of appeals affirmed the district court's rejection of both an absolute and a qualified privilege, in the absence of any Iowa state court decision clearly suggesting how the Iowa courts would potentially have resolved the particular questions of common law privilege presented in that case. In the absence of a clearly applicable common law privilege, the court ruled (contrary to the conclusion of the Washington state court in the *Richmond* case that the status of the parties "played no part" in *McDonald*), that the standard of fault to be applied to petitioning activity, under *McDonald* depends on the public figure status of the plaintiff. Therefore, in the absence of an otherwise applicable common law privilege under state law, the minimum *Gertz* negligence standard was held by the *IBP* court to apply to the private figure plaintiffs in that case.

Whether or not *McDonald* is construed as mandating a minimum constitutionally-mandated, qualified privilege to petitioning activity in order to avoid constitutional infirmity under the Petition Clause, or as simply leaving the states free to apply their own applicable privileges as a matter of state common law, other than the case at bar no case of which we

are aware — not even *IBP*, which ruled on the matter in the absence of an applicable state common law privilege — has read *McDonald* in such a way as to mandate less protection under *McDonald* than under available state common law privileges. In this case, in sharp contrast, the court of appeals erroneously ignored the otherwise applicable common law privileges under Maryland law[7] and applied a simple *Gertz*-based negligence standard to all of the Dobkins' allegedly defamatory letters — even where the letters were clearly petitions addressed to high federal government officials, including United States Senator Robert Dole and Vice President Al Gore.[8]

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7. Although the courts below erred in not addressing the issue, it is clear that Maryland common law would recognize at least a qualified privilege applicable to this case, which can be defeated only by proof of actual malice, in the *New York Times v. Sullivan* sense. *See Marchesi v. Franchino*, 283 Md. 131, 387 A.2d 1129 (Md. Ct. App. 1978)(Maryland common law "recognize[s] that a person ought to be shielded against civil liability for defamation where, in good faith, he publishes a statement in furtherance of his own legitimate interests, or those shared in common with the recipient or third parties, or where his declaration would be of interest to the public in general." In *Marchesi* the Maryland Court of Appeals, Maryland's highest court, held that " 'knowledge of falsity or reckless disregard for truth' is the standard by which the malice required to defeat the conditional privilege defense is to be measured in cases of private defamation."

8. Although it was undisputed that at least these letters fell squarely within the Petition Clause, the court of appeals noted that "some of the letters at issue were sent to .... [i]ndividuals [who] were not public officials," among whom the court included Hillary Clinton and Ross Perot. To that extent, the court held, "letters to them would not qualify as petitioning the government." Putting aside whether the First Lady of the United States, or a candidate for President of the United States, are or are not government officials for purposes of the Petition Clause, and assuming arguendo that at least some of the letters were not addressed solely to government officials, the court below nonetheless erred when it erroneously construed *McDonald v. Smith* and then applied its misreading *both* to those letters that it held were covered by the Petition Clause *and* to those that it held were not. As a result, the court of appeals failed to analyze the two categories of letters on different tracks, but instead accorded both treatment under the misapplied "negligence" standard. As we demonstrate, the letters that were clearly petitions should have been accorded an "actual malice" privilege under *McDonald* while any letters that were arguably entirely outside of the

The deficiency of this result is clear. It turns the law on its head by inappropriately causing the federal tail of *Gertz* to wag the state dog of common law privilege that this Court has long recognized as historically underlying the system of Anglo-American defamation law. The point of *Gertz*, after all, was to impose a constitutionally-mandated minimum standard of fault in order to assure that no state would impose liability without fault in those cases governed by *Gertz*. The simple negligence standard of *Gertz* has thus always been recognized as a fallback safety valve intended to save state common law from constitutional infirmity in the event that no other privilege is available, and not a federal mechanism for trumping existing, and potentially more protective state common law privileges.

In sum, this Court should grant the petition to correct this error of the court below and in order to resolve the uncertainties created by *McDonald v. Smith*, thereby giving needed guidance to the lower state and federal courts when faced with future claims of a constitutional dimension under the Petition Clause.

III. THE COURT OF APPEALS' GRANT OF SUMMARY JUDGMENT IN DOBKIN'S AFFIRMATIVE CASE DOES VIOLENCE TO THIS COURT'S MANDATE IN *ANDERSON V. LIBERTY LOBBY* THAT COURTS NOT INTRUDE, UNDER RULE 56(c), INTO THE PROVINCE OF THE JURY BY, *INTER ALIA*, MAKING CREDIBILITY DETERMINATIONS AND IS INCONSISTENT WITH THE CAUTIOUS APPROACH TO SUMMARY JUDGMENT TAKEN IN OTHER CIRCUITS THAT HAVE APPLIED *ANDERSON* ON THE ISSUE OF ACTUAL MALICE IN DEFAMATION CASES

Although in connection with the Hopkins counterplaintiffs' claims it had accorded only a "negligence" defense to the Dobkin defendants, in ruling on the motion for summary judg-

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petition clause should have been, but were not, analyzed separately under state common law.

ment as to Robert Dobkin's defamation claims the court below accorded to the Hopkins' defendants the higher privilege of "actual malice." On that issue the district court found, and the Fourth Circuit affirmed, that Dobkin had failed to come forward with sufficient proof at the summary judgment stage to submit the issue of actual malice to a jury. Yet respondents' statements about Dobkin — in particular that he had sexually exposed himself to his academic advisor in a private meeting — were disputed factual issues that could not possibly be determined without an assessment of credibility, in this one instance the credibility of the only two people in the room at the meeting in question. Malice, however, as the court of appeals recognized, could have been shown simply by demonstrating that respondent German knew that her statement in this regard was false — a classic "he said, she said" credibility dispute which, under Anderson, must be reserved for jury determination.

In *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986), this Court ruled that when determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind "the quantum and quality of proof necessary to support liability under *New York Times.*" *Anderson,* 477 U.S. at 254. This Court held that there is no genuine issue if the evidence brought forward in the opposing affidavits is "of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Id.*

Although *Anderson* was a 6 to 3 decision on the "clear and convincing" proof issue, this Court was unanimous in its concern that the courts must not become triers of fact on a motion for summary judgment, substituting their views for those of the jury with respect to the weight of evidence, the

drawing of legitimate inferences or the determination of witness credibility.[9] This Court was thus careful in *Anderson* to caution that:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. . . . Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Anderson, 477 U.S. at 255.

Masson v. New Yorker Magazine Inc., 501 U.S. 496 (1991), is the only decision by this Court to apply *Anderson* in the libel/actual malice context. In *Masson*, this Court reversed a grant of summary judgment in a context where the evidence

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9. In his dissent, then-Justice Rehnquist specifically addressed the application of the convincing clarity standard at the summary judgment stage with respect to "credibility determinations." Justice Rehnquist hypothesized a case where the plaintiff's only proof of malice is the testimony of "Witness A" who claims to have overheard the defendant reporter admitting to having "real doubts" about the accuracy of her story. Justice Rehnquist further assumed that in his deposition Witness A admits to having a prior conviction for perjury. Nonetheless, Justice Rehnquist concluded that even in those circumstances the court may not grant the defendant's motion for summary judgment on the ground that plaintiff has failed to produce sufficient proof of malice if the majority "means what it says, when it states: 'Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' " *Anderson*, 477 U.S. at 269.

tested the credibility of the plaintiff and the defendant reporter with respect to competing versions of the same events. Faced with a plaintiff who alleged that he did not make the statements that the defendant claimed he did, this Court stated, "we must assume, except where otherwise evidenced by the transcripts of the tape recordings, that [Masson] is correct in denying that he made the statements attributed to him by Malcolm, and that Malcolm reported with knowledge or reckless disregard of the differences between what [Masson] said and what was quoted." *Masson,* 501 U.S. at 520.

In the face of the clear command of *Anderson* and *Masson,* and although the District Court concluded Dobkin had established that defendant German stated that he had "exposed himself to her" Pet. App. 42a & n.23, the Fourth Circuit simply ignored Dobkin's vehement denial that he had ever exposed himself, concluding that "there was insufficient evidence of actual malice to create a jury question" referring only to the derivative allegation of "sexual harassment," on the ground that, according to the Fourth Circuit, "Dobkin . . . neither presented nor pointed to evidence that Dr. German had described the incident as sexual harassment or had acted recklessly in describing the incident." Pet. App. 67a. In so casually affirming the grant of summary judgment, the Fourth Circuit not only ignored the central, material allegation of sexual exposure but it evidently purported to resolve the disputed credibility issue as to exposure, as well as to draw adverse inferences regarding the claim of sexual harassment, against Dobkin as the nonmovant, *sub silentio.*

The loose application of the standards for summary judgment by the Fourth Circuit in *Dobkin* is at odds with several decisions in other federal circuits applying *Anderson* in defamation cases. In *Zerangue v. TSP Newspapers,* 814 F.2d 1066 (5th Cir. 1987), for example, the Fifth Circuit conducted a far more careful application of *Anderson.* In the case, which arose out of the erroneous reporting of the circumstances surrounding the arrests of two former police officers, the court stated:

> While the public figure plaintiff in a libel case must meet the "clear and convincing" standard of proof in order to defeat summary judgment, all of the

> other summary judgment rules still apply . . . . This means that a judge must deny summary judgment if the opponent shows any "genuine issue" of "material fact," and must draw all possible inferences in the opponent's favor . . . . Generally, determinations of state of mind and of witness credibility are for the factfinder.

Zerangue, 814 F.2d at 1071.

Including the Fifth Circuit's decision in *Zerangue*, at least six circuits have followed this Court's cautionary mandate when confronted with the question of summary judgment on issue of actual malice in defamation cases.

In *Toney v. WCCO Television*, 85 F.3d 383 (8th Cir. 1996), a case involving conflicting affidavits, the court held that summary judgment was not supportable as to one disputed statement because "at the very least, the conflict between the two affidavits should be resolved by a jury, not by the district judge's ruling . . ." And in *Milsap v. Journal/Sentinel Inc.*, 100 F.3d 1265 (7th Cir. 1996), a case also involving conflicting affidavits, the court held that, "[w]ere a trier of fact to believe [plaintiffs' affidavits] and disbelieve [defendant], it could reasonably conclude that there was clear and convincing evidence that [defendant] had lied or recklessly disregarded the truth in making the assertion in question.[10]

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10. In two other non-Federal Circuit cases, presenting similarly stark conflicts in affidavit testimony, the courts denied or reversed grants of summary judgment under authority of *Anderson*. In *Edwards v. Hall*, 234 Cal. App. 3d 886, 285 Cal. Rptr. 810 (Cal. Ct. App. 2d Dist. 1991), party and witness declarations established a clear conflict regarding whether certain statements were or were not made in private meetings. The court concluded that "[t]his is precisely the type of case the United States Supreme Court was referring to in recognizing 'that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment does not denigrate the role of the jury [quoting at length the cautionary language of *Anderson*]. . . .' In light of the sharply contrasting versions of events which transpired at the November 30 meeting, as well as the conflicting inferences which may reasonably be drawn from the evidence, we conclude triable issues of material fact exist." And in *Adler v. Conde Nast Publications*, 643 F. Supp. 1558 (S.D.N.Y. 1986), deposition testimony was in conflict as to whether the sources for the allegedly defamatory article included the Editor-

In *McBride v. Merrell Dow*, 800 F.2d 1208 (D.C. Cir. 1986), the D.C. Circuit reversed a grant of summary judgment in favor of the authors and publishers of a statement arguably suggesting that the plaintiff scientist's testimony as an expert witness "was for sale," and criticized the district court for its assumption that, at the summary judgment stage, and without a close examination of the actual malice issue, the court could simply arrive at a "conclusive presum[ption]," as a matter law, "precluding resort to actual evidence of the defendants' state of mind."

In *Crane v. The Arizona Republic*, 972 F.2d 1511 (9th Cir. 1992), the Ninth Circuit held that plaintiffs "came forth with sufficient evidence to permit a reasonable jury to conclude that [defendant]'s juxtaposing of their denials was undertaken

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NOTES *(Continued)*

in-Chief of the defendant publisher. It was conceded that the Editor-in-Chief was in a position to know whether the plaintiff had resigned or had been fired for incompetence and that, therefore, if the Editor had been the source actual knowledge of falsity would have been undeniable and attributable to the defendant publisher. Although the author of the allegedly defamatory article denied that he had ever discussed plaintiff with the Editor, there was some evidence which, if credited, could have supported an inference that the Editor was the source of the defamatory information. Addressing the effects of *Anderson*, the district court observed, *id.* at 1566:

> "With respect to Conde Nast, the real problem is to determine precisely what the Supreme Court meant by its ruling in *Anderson v. Liberty Lobby, supra*, that malice must be established by "clear and convincing evidence." If the Court meant that the underlying facts upon which the inference of malice was to be drawn must be so established, Conde Nast would surely be entitled to summary judgment. The facts upon which plaintiff seeks to base the inference that [the Editor-in-Chief] provided [the author] with the defamatory information are tenuous at best while the contrary evidence seems substantial. If, on the other hand, the Court meant only that it must be possible "clearly and convincingly" to draw an inference of malice from facts which the jury was entitled to find by ordinary evidentiary rules, then plaintiff must prevail on this motion. We conclude that the latter rule is the correct one.
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either with knowledge or in reckless disregard of the false impression concerning Henderson's and Crane's credibility that would result."

And in *St. Surin v. Virgin Islands Daily News Inc.*, 21 F.3d 1309, 1318 (3rd Cir. 1994) the Third Circuit reversed the lower court's grant of summary judgment, finding that because "[t]he only source the present record shows for misrepresentation of the government's position is the editor, and neither she nor the reporter have identified any basis for the change she made in the article asserting the prosecutor planned to bring charges imminently," a genuine dispute of material fact exists as to actual malice. *See also Schiavone Construction Co. v. Time Inc.*, 847 F.2d 1069, 1090 (3d Cir. 1988)(in affirming the denial of summary judgment on the issue of actual malice, the court cautioned "[e]ven though the standard for actual malice is difficult to meet, and even though it must be met by clear and convincing evidence, we nonetheless must not lose sight of the fact that we decide this question on summary judgment. On summary judgment, '[t]he movant's allegations must be taken as true and, when these assertions conflict with those of movant, the former must receive the benefit of the doubt.")

In light of this conflict of approach among the Circuits, and because of the importance of the issue as a matter of summary judgment procedure under the Federal rules, this Court should grant the petition on this additional issue in order to assure that the courts of appeals properly apply the

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"Applying these rules to the situation at bar, it is clear that based on the evidence presented by plaintiff, we must find that a question of fact has been presented as to whether 1) [the Editor-in-Chief] had told [the author] that he had fired plaintiff and 2) he accused her of incompetence in having bought unusable material. Avedon's testimony as well as the conflicting testimony about whether [e Editor-in-Chief] in fact ever spoke to [the author] about [the plaintiff] and, if so, why he later denied it, raise such a question of fact. Should the jury decide these facts in plaintiff's favor, a finding of actual malice would almost inevitably follow. By hypothesis [the Editor-in-Chief] knew he had not fired plaintiff . . . . Accordingly, a jury could find actual malice with convincing clarity, and Conde Nast's motion must be denied."

rule of *Anderson* in future cases thereby preserving the proper allocation of function and authority as between the lower courts and the jury in federal cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

U.S. CONST. AMEND. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. §288. National Research Service Awards:

(a) Biomedical and behavioral research and research training; programs and institutions included; restriction; special consideration

(1) The Secretary shall—

(A) provide National Research Service Awards for—

(i) biomedical and behavioral research at the National Institutes of Health in matters relating to the cause, diagnosis, prevention, and treatment of the diseases or other health problems to which the activiities of the National Institutes of Health and Administration are directed;

(ii) training at the National Institutes of Health and at the Administration of individuals to undertake such research;

(iii) biomedical and behavioral research and health services research (including research in primary medical care) at public and nonprofit private entities; and

(iv) pre-doctoral and post-doctoral training at public and private institutions of individuals to undertake biomedical and behavioral research;

(B) make grants to public and nonprofit private institutions to enable such institutions to make National Research Service Awards for research (and training to undertake biomedical and behavioral research) in the matters described in subparagraph (A)(i) to individuals selected by such institutions; and

(C) provide contracts for scholarships and loan repayments in accordance with sections 288—4 and 288—5 of this title, subject to providing not more than an aggregate 50 such contracts during the fiscal years 1994 through 1996.

A reference in this subsection to the National Institutes of Health shall be considered to include the institutes, agencies, divisions, and bureaus included in the National Institutes of Health or under the Administration, as the case may be.

(2) National Research Service Awards may not be used to support residency training of physicians and other health professionals.

(3) In awarding National Research Service Awards under this section, the Secretary shall take account of the Nation's overall need for biomedical research personnel by giving special consideration to physicians who agree to undertake a minimum of two years of biomedical research.

(4) The Secretary shall carry out paragraph (1) in a manner that will result in the recruitment of women, and individuals from disadvantaged backgrounds (including racialand ethnic minorities), into fields of biomedical or behavioral research and in the provision of research training to women and such individuals.

(b) Prerequisites for Award; review and approval by appropriate advisory councils; Award period; uses for Award; payments to non-Federal public or nonprofit private institutions

(1) No National Research Service Award may be made by the Secretary to any individual unless—

(A) the individual has submitted to the Secretary an application therefore and the Secretary has approved the application;

(B) the individual provides, in such form and manner as the Secretary shall by regulation prescribe, assurances satisfactory to the Secretary that the individual will meet the service requirement of subsection (c) of this section; and

(C) in the case of a National Research Service Award for a purpose described in subsection (a)(1)(A)(iii) of this section, the individual has been sponsored (in such manner as the Secretary may by regulation require) by the institution at which the research or training under the award will be conducted.

An application for an award shall be in such form, submitted in such manner, and contain such information, as the Secretary may by regulation prescribe.

(2) The making of grants under subsection (a)(1)(B) of this section for National Research Service Awards shall be subject to review and approval by the appropriate advisory councils within the Department of Health and Human Services (A) whose activities relate to the research or training under the awards, or (B) for the entity at which such research or training will be conducted.

(3) No grant may be made under subsection (a)(1)(B) of this section unless an application therefor has been submitted to and approved by the Secretary. Such application shall be in such form, submitted in such manner, and contain such information, as the Secretary may be regulation prescribe. Subject to the provisions of this section (other than paragraph (1)), National Research Service Awards made under a grant under subsection (a)(1)(B) of this section shall be made in accordance with such regulations as the Secretary shall prescribe.

(4) The period of any National Research Service Award made to any individual under subsection (a) of this section may not exceed—

(A) five years in the aggregate for pre-doctoral training; and

(B) three years in the aggregate for post-doctoral training;

unless the Secretary for good cause shown waives the application of such limit to such individual.

(5) National Research Service Awards shall provide for such stipends, tuition, fees, and allowances (including travel and subsistence expenses and dependency allowances), adjusted periodically to reflect increases in the cost of living,

for the recipients of the awards as the Secretary may deem necessary. A National Research Service Award made to an individual for research or research training at a non-Federal public or nonprofit private institution shall also provide for payments to be made to the institution for the cost of support services (including the cost of faculty salaries, supplies, equipment, general research support, and related items) provided such individual by such institution. The amount of any such payments to any institution shall be determined by the Secretary and shall bear a direct relationship to the reasonable costs of the institution for establishing and maintaining the quality of its biomedical and behavioral research and training programs.

(c) Health research or teaching; service period; recovery upon noncompliance with service requirement, formula; concellation or waiver of obligation

(1) Each individual who is awarded a National Research Service Award for postdoctoral research training shall, in accordance with paragraph (3), engage in research training, research, or teaching that is health-related (or any combination thereof) for the period specified in paragraph (2). Such period shall be served in accordance with the usual patterns of scientific employment.

(2)(A) The period referred to in the paragraph (1) is 12 months, or one month for each month for which the individual involved receives a National Research Service Award for postdoctoral research training, whichever is less.

(B) With respect to postdoctoral research training, in any case in which an individual receives a National Research Service Award for more than 12 months, the 13th month and each subsequent month of performing activities under the Award shall be considered to be activities engaged in toward satisfaction of the requirement established in paragraph (1) regarding a period of service.

(3) The requirement of paragraph (1) shall be complied with by any individual to whom it applies within such reasonable period of time, after the completion of such individual's award, as the Secretary shall by regulation prescribe. The Sec-

retary shall by regulation prescribe the type of research and teching in which an individual may engage to comply with such requirement and such other requirements respecting research and teaching as the Secretary considers appropriate.

(4)(A) If any individual to whom the requirement of paragraph (1) is applicable fails, within the period prescribed by paragraph (3), to comply with such requirements, the United States shall be entitled to recover from such individual an amount determined in accordance with the formula—

$$A = \theta \left(\frac{t-s}{t}\right)$$

in which "A" is the amount the United States is entitled to recover; "θ" is the sum of the total amount paid under one or more National Research Service Awards to such individual; "t" is the total number of months in such individual's service obligation; and "s" is the number of months of such obligation served by such individual in accordance with paragraphs (1) and (2) of this subsection.

(B) Any amount which the United States is entitled to recover under subparagraph (A) shall, within the three-year period beginning on the date the United States becomes entitled to recover such amount, be paid to the United States. Until any amount due the United States under subparagraph (A) on account of any National Research Service Award is paid, there shall accrue to the United States interest on such amount at a rate fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date the United States becomes entitled to such amount.

(5)(A) Any obligation of an individual under paragraph (1) shall be canceled upon the death of such individual.

(B) The Secretary shall be regulation provide for the waiver or suspension of any such obligation applicable to any individual whenever compliance by such individual is impossible or would involve substantial hardship to such individual or would be against equity and good conscience.

(d) Authorization of appropriations; apportionment

For the purpose of carrying out this section, there are authorized to be appropriated $400,000,000 for fiscal year 1994, and such sums as may be necessary for each of the fiscal years 1995 and 1996. Of the amounts appropriated under this subsection—

(1) not less than 15 percent shall be made available for payments under National Research Service Awards provided by the Secretary under subsection (a)(1)(A) of this section;

(2) not less than 50 percent shall be made available for grants under subsection (a)(1)(B) of this section for National Research Service Awards;

(3) 1 percent shall be made available to the Secretary, acting through the Administrator of the Health Resources and Services Administration, for payment under National Research Service Awards which (A) are made to individuals affiliated with entities which have received grants or contracts under section 293, 293*l*, or 293m of this title, and (B) are for research in primary medical care; and 1 percent shall be made available for payments under National Research Service Awards made for health services research by the Agency for Health Care Policy and Research under section 242b(a) of this title; and

(4) not more than 4 percent may be obligated for National Research Service Awards for periods of three months or less.

42 C.F.R. § 66.205:

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SUBCHAPTER E—FELLOWSHIPS, INTERNSHIPS, TRAINING PART 66—NATIONAL RESEARCH SERVICE AWARDS
SUBPART B—INSTITUTIONAL GRANTS

Requirements.

(a) No Award shall be made to an individual from a grant under this subpart unless:

(1) For any Award made for a period in excess of twelve months, other than an Award made for research training at the baccalaureate level, the individual has submitted to the Secretary a written assurance (in the manner the Secretary may prescribe) that he or she will satisfy the requirements of § 66.110 of Subpart A of this part;

(2) The individual is a citizen or non-citizen national of the United States or has been lawfully admitted to the United States for permanent residence at the time of application;

(3) The Award includes a provision for termination in the event the recipient is found by the institution to have materially failed to comply with the terms and conditions of the Award or to carry out the purpose for which it was made; and

(4) The Aware is not to be used to support a residency.

(b) No Award shall be made to an individual under such grant which would provide that individual with aggregate support in excess of five years for predoctoral training and three years for postdoctoral training, unless the Secretary for good cause shown as provided in § 66.106(d) of Subpart A of this part, waives the application of the limitation with respect to that individual.

(c) The provisions of §§ 66.110 and 66.111 of Subpart A of this part constitute terms and conditions of any Award made from a grant under this subpart.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

ROBERT S. DOBKIN, *Plaintiff,*	:	Civil Action No. HAR 93-2228
v.	:	
	:	
THE JOHNS HOPKINS UNIVERSITY, ET AL., *Defendants.*	:	

January 25, 1994, Decided

January 25, 1994, Filed; February 1, 1994, Entered

JOHN R. HARGROVE, J.

MEMORANDUM OPINION

Seeking to augment the number of highly trained scientists dedicating their talents and energies to health-related research, Congress, under the Public Health Service Act, 42 U.S.C. §§ 201 et seq., authorized the Department of Health and Human Services ("HHS") to "provide National Research Service Awards for . . . predoctoral . . . training at public and private institutions of individuals to undertake biomedical and behavioral research." 42 U.S.C. § 288(a)(1)(A)(iv). Under the National Research Service Award ("NRSA") program, HHS, though the National Institutes of Health ("NIH") and its constituent institutes, agencies, divisions and bureaus, may make awards directly to promising young scientists, 42 U.S.C. § 288(a)(1)(A), or may "make grants to public and nonprofit private institutions to enable such institutions to make National Research Service Awards." 42 U.S.C. § 288(a)(1)(B). In 1989, Congress appropriated $300 million for NRSAs, mandating that "not less than fifty percent be made available for [institutional] grants under subsection (a)(1)(B)." 42 U.S.C. § 288(d)(2).

Under either direct or institutional awards, individual recipients, in consideration of the federal government's financial support, agree to "engage in health research or teaching

or any combination thereof," 42 U.S.C. § 288(c)(1), for a period of time equal to the period of NRSA support in excess of one year. 42 U.S.C. § 288(c)(2). This exchange is known as the "payback agreement."[1]

In 1987, the Johns Hopkins University School of Hygiene and Public Health ("the School") applied to the National Institute on Aging ("NIA"), an institute of the NIH, for a training grant for the School's interdepartmental "Gerontology in Public Health program." In its grant proposal, the School explained:

> This proposal requests resources for training eight predoctoral students in a newly developed interdepartmental gerontology program at The Johns Hopkins University School of Hygiene and Public Health. . . . It is anticipated that four years will be required for completion of the program and a phasing in of students is planned to achieve a steady state of eight.

The NIA approved the School's proposal, facilitating the commencement of the interdepartmental gerontology program in the 1989-1990 academic year.

In February 1990, the School accepted Robert Dobkin as a doctoral candidate in its "Department of Health and policy Management." Simultaneously, Mr. Dobkin gained admission to the interdepartmental gerontology program.[2] Thereafter, Mr. Dobkin successfully applied for appointment to one of the

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1. Recipients of NRSAs must begin to undertake their service obligation on a continuous basis within two years after the termination of their awards. 42 C.F.R. § 66.110(a), (b). If a recipient fails to fulfill his or her service requirement, the United States is entitled to recover the total amount of NRSA funds paid to the individual for the obligated period, plus interest. 42 U.S.C. § 288(c)(4)(A), (B). By requiring NRSA recipients to engage in health-related research for a period equal to the period of support "in excess of twelve months," Congress necessarily granted recipients one year of "free" financial support.

2. According to the School, a student admitted to the "Gerontology in Public Health Program," upon completion of all requirements, receives a certificate in gerontology in addition to the doctoral degree from the department to which he or she was admitted.

NRSA traineeships. According to Mr. Dobkin, Dr. Pearl German, the School's administrator of the NRSA traineeships, informed him that he was the only student in his class to receive a full, five-year traineeship. Compliant ¶ 17.

The above-captioned dispute arises out of the School's termination of Mr. Dobkin's NRSA traineeship after just two years. According to the complaint, the School's decision to terminate the traineeship was immediately precipitated by Mr. Dobkin's inability to complete the departmental oral examination administered on June 15, 1992.[3] On June 24, 1992, Dr. German convened a meeting of the interdepartmental gerontology "Advisory Panel" which, in addition to Dr. German, consisted of Professors Rowland, Roter and Kasper;[4] the panel decided to terminate Mr. Dobkin's traineeship.[5] On July 21, 1992, Dr. German transmitted a "NRSA Termination Notice" to the NIA. In the section under the form's statement, "if fellowship or training appointment is being terminated early," (emphasis added), Dr. German explained:

> In the second year of training, Mr. Dobkin sat for and passed his Departmental written examination. His scores were passing but only fair and included scores of 3 (minimal pass) on two questions. . . . His major activity during this year was designing a pro-

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3. Mr. Dobkin alleges that during the oral examination, three of the four examiners, Dr. Brant, Dr. Starfield and Professor Rowland, questioned him about subjects different from those they had represented would be tested. Complaint ¶ 93. In particular, Mr. Dobkin contends that Professor Rowland informed him prior to the test that she would question him about "bereavement-related health policy," Complaint ¶ 91, but instead asked him about "health services research and Medicare." Complaint ¶ 93. Mr. Dobkin appears to rely on Professor Rowland's alleged misrepresentation as the factual basis for seeking relief against her under Count Eight; he does not make similar claims for misrepresentation against Dr. Brant or Dr. Starfield.

4. Mr. Dobkin alleges that the Advisory Panel was supposed to be comprised of interdepartmental gerontology faculty but instead consisted of faculty of the Department of Health and Policy Management. Mr. Dobkin further contends that the faculty on the panel were subordinate to Dr. German. Complaint ¶ 101.

5. The School did not dismiss Mr. Dobkin from either the doctoral program or the interdepartmental gerontology certificate program. It did, however, require him to pay his own tuition and expenses.

> posal for a dissertation and he had great difficulty with this. He was unable to grasp the essentials of designing a research project, of handling a data set with which to carry out the project, or organizing an analytic plan for the project. Mr. Dobkin subsequently failed his departmental oral examination which precedes the school-wide orals required before the student can begin dissertation work. The departmental examiners felt there were serious gaps in his knowledge of the most basic concepts of social policy and gerontology. An advisory panel met to consider the entire situation and voted unanimously to discontinue his traineeship.

Mr. Dobkin contends that Dr. German's explanation was replete with lies and misrepresentations, inaccurately portraying his academic progress and promise. Complaint ¶¶ 116-128. Furthermore, Mr. Dobkin asserts that Dr. German's submission "bespeaks her intention to force him from the University and to destroy [his] professional reputation and future." Complaint ¶ 129.[6] On September 21, 1992, the NIA officially terminated Mr. Dobkin's NRSA based on Dr. German's explanation. According to Mr. Dobkin, the stigma created by the wrongful termination of his traineeship has ruined his academic and professional future. Complaint ¶¶ 135, 136.[7]

According to Mr. Dobkin, Dr. German's motivation to oust him from his traineeship was sparked by her belief that the spectacular progress he made during his first two years would "devalue" her interdepartmental program by making its requirements appear too easy to fulfill. Complaint ¶ 56. Pro-

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6. Mr. Dobkin contends that in addition to Dr. German, the other members of the Advisory Panel had personal motives to seek revenge against him. Complaint PP 130, 131. However, Mr. Dobkin provides factual support for such alleged personal animus only with respect to Dr. German and Professor Kasper; no similar support is offered concerning Professors Rowland and Roter.

7. In paragraphs 136 and 153 of his complaint, Mr. Dobkin alleges that Dr. German and Estelle Fishbein, Vice President and General Counsel for JHU have spread false and defamatory rumors about him since his traineeship has ended. Complaint ¶ 150.

fessor Kasper's purported animus against Mr. Dobkin, according to the complaint, stems from his complaints "to her supervisors . . . that she was often unprepared for the classes she was teaching." Complaint ¶ 121.

On July 30, 1993, Mr. Dobkin filed a 44 page, 189 paragraph complaint against (1) The Johns Hopkins University ("JHU"), (2) the School,[8] (3) Estelle Fishbein, (4) Dr. German, (5) Professor Kasper, (6) Professor Roter and (7) Professor Rowland, (collectively, "the Hopkins Defendants"). Additionally, Mr. Dobkin sued the NIH and the NIA, (collectively, "the Federal Defendants"). presently before the Court are the Hopkins Defendants' and the Federal Defendants' separately filed Motions to Dismiss. The Court has reviewed the complaint, the parties' respective memoranda and the exhibits attached thereto;[9] no hearing is deemed necessary. Local Rule 105(6) (D.Md. 1992).

Discussion

I. Standing to Sue the NIA/NIH

As a threshold matter, the Federal Defendants contend that under the NRSA's institutional grant scheme, JHU possessed unrestricted authority to select award recipients, to establish the criteria for renewing awards, and importantly, to terminate such awards. Consequently, the Federal Defendants argue that Mr. Dobkin lacks standing to sue them.

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8. As Mr. Dobkin now concedes, the School is a division of JHU, not a distinct, suable entity. Consequently, all claims against the School will be dismissed.

9. For purposes of resolving the pending motions, the Court construes the complaint in the light most favorable to Mr. Dobkin; its well-pleaded factual allegations are taken to be true. *Jenkins v. McKeithen*, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969); *Scheuer v. Rhodes*, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). To the extent that the Court considers matters outside the four corners of the complaint, the motions shall be treated as ones for summary judgment. Fed.R.Civ.P. 12(b). Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106, S. Ct. 2505 (1986).

> At an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) (citations omitted). According to the Federal Defendants, Mr. Dobkin cannot demonstrate (1) that his injury can be traced to the actions of the NIA/NIH, or (2) that his injury is likely to be redressed by a judgment against the NIA/HIH.

While Congress, under 42 U.S.C. §288(a)(1)(B), delegated the daily administration of institutional NRSA grants to the public and nonprofit private entities selected by HHS, the applicable regulations anticipate some governmental supervision over how federal dollars are ultimately disbursed. HHS may require institutions seeking to distribute NRSAs to "set forth in detail the proposed methods for monitoring and evaluating the performance of individual recipients of Awards." 42 C.F.R. § 66.204(b)(7). Institutions may not make awards to an individual "unless the Award includes a provision for termination in the event the recipient is found by the institution to have materially failed to comply with the terms and conditions of the award or to carry out the purposes for which it was made." 42 C.F.R. § 66.205(a)(3). Moreover, HHS is authorized to "impose additional conditions prior to or at the time of any award when in the Secretary's judgment such conditions are necessary to assure the carrying out of the purposes of the award, the interests of public health or the conservation of the funds awarded." 42 C.F.R. § 66.115. Thus, contrary to the Federal Defendants' assertions, JHU did not have unfettered discretion to administer NRSA funds however it so chose; in the absence of a complete factual record, the Court cannot now find that Mr. Dobkin's purported injuries are not traceable to the acts or omissions of the NIA.

Nor is the Court persuaded that a judgment against the Federal Defendants would be unlikely to redress Mr. Dobkin's supposed injuries. The United States may not have the authority to compel JHU to reinstate Mr. Dobkin's traineeship, but it certainly could forgive his payback obligation, make another NRSA available to him directly under 42 U.S.C.§288 (a)(1)(A), or withdraw from JHU any future NRSA funding.

Under §288(a)(1)(B), Congress authorized institutions like JHU to act on behalf of the federal government. In accordance with its delegated authority, JHU entered into a binding payback agreement with Mr. Dobkin, the benefits of which accrue to the public at large. This quid pro quo aspect of the NRSA program distinguishes Mr. Dobkin's claims from those discussed in *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622 (4th Cir. 1993), a case upon which the Federal Defendants rely. Contrary to the "general oversight authority" which HUD exercises over local public housing authorities' distribution of federally subsidized housing entitlements, HHS, and derivatively, the NIA/NIH, are the beneficiaries of Mr. Dobkin's payback obligations. Given the nascent stage of this litigation and the absence of a factual description of the three-way relationship between the NIA/NIH, JHU and Mr. Dobkin, the Court will not conclude, as a matter of law, that the Federal Defendants are not legally responsible for any unlawful, and perhaps unconstitutional actions taken by the public and nonprofit private entities to which the United States has entrusted its bidding.

II. Due Process (Count One)

Mr. Dobkin contends that the termination of his NRSA traineeship deprived him of a constitutionally protected property interest and that the stigma accompanying the termination deprived him of a constitutionally protected liberty interest. In Count One, Mr. Dobkin alleges that such deprivations violated his constitutional right to procedural and substantive due process. In support of their respective Motions to Dismiss, both the Hopkins Defendants and the Federal Defendants argue that Mr. Dobkin is not entitled to invoke the protections of the Due Process Clause because his purported injuries do

not rise to constitutional proportions. While the Court agrees that Mr. Dobkin has failed to articulate a cognizable liberty interest, he has stated a cause of action under the Due Process Clause concerning the deprivation of a property interest.

A. Liberty Interest

"Liberty interests subject to the protections of due process are present 'where a person's good name, reputation, honor and integrity are at stake because of what the government is doing to him.' " *Crook v. Baker,* 584 F. Supp. 1531, 1554 (E.D.Mich. 1984) (citing *Wisconsin v. Constantineau,* 400 U.S. 433, 437, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971)). Mr. Dobkin alleges that the termination of his traineeship may seriously damage his standing and reputation, imposing on him a stigma which forecloses his freedom to take advantage of future educational or professional opportunities. However,

> for a liberty interest entitled to procedural protections to be found on the basis of defamatory conduct, the conduct must, in addition to imposing a stigma, be accompanied by the deprivation of a right previously held under state law, or result in the alteration of legal status which justifies the invocation of procedural safeguards.

Crook, 584 F. Supp. at 1555. "[A] loss or injury [cannot] constitute the deprivation of a liberty interest unless that loss involve[s] a removal, extinguishment or significant alteration of an interest recognized and protected by law." *Chaudhry v. Prince George's County,* 626 F. Supp. 448, 454 (D.Md. 1985) (citing *Paul v. Davis,* 424 U.S. 693, 710-711, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)). See also *Bishop v. Wood,* 426 U.S. 341, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976).

As a matter of law, it is not enough that Mr. Dobkin has alleged that the perceived damage to his reputation may restrict his future academic and employment opportunities because such opportunities are not created nor guaranteed by statute. Consequently, Mr. Dobkin's due process claim predicated upon the existence of a protected liberty interest will be dismissed.

B. Property Interest

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth,* 408 U.S. 564, 576, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Both the Hopkins Defendants and the Federal Defendants contend that, given JHU's discretion over his NRSA traineeship, Mr. Dobkin, at most, had a unilateral hope that it would be renewed.

"Property interests, of course, are not created by the Constitution. Rather, they are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. In *Perry v. Sindermann,* 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), the Supreme Court recognized that "mutually explicit understandings," implied from "words and conduct in light of the surrounding circumstances" may constitute "an unwritten 'common law' " which satisfies the "independent source" prerequisite for due process protection. The Fourth Circuit has reaffirmed that an entitlement implicating a property interest may be implied from policies, practices and understandings. *Richardson v. Eastover,* 922 F.2d 1152, 1157 (4th Cir. 1991).

Neither the statute authorizing NRSAs nor the regulations promulgated thereunder create a protected property interest for award recipients; moreover, the traineeship contracts signed by Mr. Dobkin indicate finite periods of support.[10] However, several facts already exist in the record which

10. On August 24, 1990, Mr. Dobkin signed a "Statement of Appointment of Trainee" indicating that his award was for the ten month period between September 1, 1990 and June 30, 1991. On August 7, 1991, Mr. Dobkin signed another "Statement of Appointment of Trainee" form indicating a one year period of appointment between July 1, 1991 and June 30, 1992. On June 24, 1992, Mr. Dobkin signed a third "Statement of Appointment of Trainee" form; although it appears that the dates on the form have been "whited-out" and edited, it currently indicates that Mr. Dobkin's third NRSA appointment ran only for one month, between July 1, and July 31,

suggest that recipients of NRSAs participating in the School's predoctoral, interdepartmental gerontology program would continue to receive financial support, absent material noncompliance with the terms and conditions of the award, until they completed their studies. First, as noted above, the NRSA's statutory payback obligations do not begin until after the recipient has received twelve months of financial assistance. Given its desire to ensure that an adequate number of well-trained scientists would be engaged for a "continuous period" in biomedical or behavioral health-related research, and its choice to effectuate that objective through payback agreements, it is unlikely that Congress envisioned that the entities entrusted to administer the NRSAs would terminate them, without justification, after only one-year.

Second, the NIA's "Termination Notice" form expressly asked for an explanation why the traineeship was being terminated "early." In addition to militating against the suggestion that the notice was intended solely to satisfy internal accounting requirements, such language supports the inference that Mr. Dobkin's traineeship was intended to last longer than it did, (after all, if JHU had the right to terminate him at its discretion, such termination would never be "early"); additionally, the language on the form bolsters the conclusion that JHU had to support a decision to terminate an NRSA with good cause, (after all, if JHU could terminate NRSA recipients for any reason it deemed appropriate, the NIA would not necessarily have sought an explanation).

Third, in her initial grant proposal, Dr. German represented that eight predoctoral students would participate in the interdepartmental gerontology program and that each student would require approximately four years to complete the program. Moreover, according to Dr. German's proposal, students were to be "phased in" so as to achieve a steady state of eight. The training grants which the NIA provided presumably were predicated on the program needs described in Dr. German's proposal, a proposal which suggests that NRSA recipients par-

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1992. The authenticity of the June 24, 1992 appointment form is obviously a question of fact.

ticipating in the program would continue to receive NRSA funding until they satisfied the gerontology certificate's requirements.

Finally, Mr. Dobkin alleges that Dr. German orally represented that he had received a "full, five-year traineeship." This representation, in light of the other objective factors outlined above, could support the conclusion that there existed "mutually explicit understandings" concerning annual NRSA renewals. "It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. at 577. If he can establish that JHU had adopted an "unwritten common law" under which NRSA recipients would continue to receive financial support as long as they materially complied with the terms and conditions of their awards, Mr. Dobkin may have demonstrated that he enjoyed a constitutionally protected property interest in the renewal of his traineeship. Because such a showing, necessarily, is fact dependent, the motions to dismiss Count One will be denied.[11]

In addition, Mr. Dobkin alleges that his substantive due process rights have been abridged. In both *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978) *and Regents of University of Michigan v. Ewing*, 474 U.S. 214, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985), the Supreme Court assumed without deciding that an arbitrary and capricious dismissal from an academic program could violate a student's substantive due process rights regardless of the process afforded. The Court sees no reason to draw a distinction between the arbitrary dismissal from an academic program and the de facto dismissal which the arbitrary termination of financial support may effectuate. While this Court will not review the reasonableness of JHU's evalu-

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11. According to his complaint, and undisputed by the Defendants, Mr. Dobkin received no hearing prior to the termination of his traineeship. While he may be entitled to no more than an informal "give and take," Mr. Dobkin's allegation that he received no process, in light of the Court's conclusion that he has articulated a protected property interest, states a claim for a possible violation of procedural due process.

ation of Mr. Dobkin's academic performance, in essence, Mr. Dobkin has alleged that the Advisory Panel's decision to terminate his traineeship was "such a substantial departure from accepted academic norms as to demonstrate that the . . . committee . . . did not actually exercise professional judgement." *Id.* at 225. The Court has had no opportunity to scrutinize the factual basis for Mr. Dobkin's allegations that JHU is concealing nonacademic reasons for his termination or that JHU, in terminating his traineeship, acted in bad faith. Thus, for the time being, Mr. Dobkin may also pursue his substantive due process claim.

III. Implied Causes of Action under the Public Health Service Act (Counts Two and Four)

Mr. Dobkin alleges that both the Hopkins Defendants and the Federal Defendants violated the terms of the Public Health Service Act ("the Act") regarding institutional NRSA grants by (1) termination his traineeship despite his compliance with all award requirements (Count Two), and (2) failing to afford him any process before his traineeship was terminated (Count Four). Moreover, Mr. Dobkin contends that the federal Defendants violated the Act by delegating their authority to determine continued eligibility for NRSA traineeships to JHU without (a) promulgating regulations setting forth the requisite fair procedures and standards for termination, (b) adequately monitoring the Hopkins Defendants, or (c) responding to his specific requests for an appeal (Count Four). However, the Act does not expressly provide a private cause of action, and for the reasons discussed below, the Court declines to create one.

"The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction . . . [and] what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis,* 444 U.S. 11, 16, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979).[12] The judicial conundrum turns on what constitutes

12. Over the past thirty years, the Supreme Court has steadily retreated

evidence of congressional intent. As a mechanism for discerning Congress' intent, federal courts have historically turned to the four factors set out in Cort v. Ash; [13] however, it is not clear that Cort reflects the current state of federal common law. In *Cannon v. University of Chicago*, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), the Supreme Court construed Cort's four factors as subsidiary to the discovery of legislative intent. In dissent, Justice Powell argued that,

> the mode of analysis we have applied in the recent past cannot be squared with the doctrine of separation of powers. . . In recent history the Court has tended to stray from the Article III and separation of powers principle of limited jurisdiction. This, I believe, is evident from a review of the more or less haphazard line of cases that led to our decision in Cort v. Ash. . . . The 'four factor' analysis of that case is an open invitation to federal courts to legislative causes of action not authorized by Congress.

NOTES *(Continued)*

from the hospitable attitude toward implied causes of action that it first articulated in *J.I. Case Co. v. Borak*, 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964). The Borak approach allowed federal courts to create a private right of action, in the absence of any express congressional authorization, if a suit for damages would help effectuate the purpose for a statute and if no legislative history mitigated against authorizing such a remedy. Even under *Borak*, it is not immediately apparent that the policy interests supporting the NRSA program would benefit from the availability of private damage suits. Congress established the NRSA program to generate a supply of highly trained research scientists, not to subsidize particular students' educations. Rather than permit disappointed award recipients to sue for damages, Congress may well have intended scarce resources to be spent on supporting scientific training.

13. "First, is the plaintiff one of the class for whose especial benefit the statute was enacted — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. 66, 78 (1975) (citations omitted).

> It is an analysis not faithful to the constitutional principles and should be rejected. Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.

441 U.S. at 730-731 (emphasis added). Later that same year, a majority of the Court, in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979), adopted Justice Powell's position: federal courts will create a private right of action only if there is affirmative evidence of Congress' intent to create a private right of action.[14]

There is no affirmative evidence, explicit or implicit, that Congress intended to create a private right of action for recipients of NRSAs disappointed by the reasons why, or manner in which, their traineeships are terminated. Moreover, no congressional intent to create a private cause of action "appear[s] implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Thompson*, 484 U.S. at 94. Despite his protestations to the contrary, Mr. Dobkin is not necessarily "one of the class for whose especial benefit the statute was enacted." Congress did not appropriate hundreds of millions of dollars to subsidize individual educations; instead, the intended beneficiary of the NRSAs, as evidenced by the payback agreements, is the American public. It is not clear that exposing the NIA/NIH or the grant receiving institutions to large damage liability, potentially taking limited funds away from research pursuits, would be consistent with

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14. Although the Supreme Court in Touche Ross did not expressly discard Cort v. Ash, it articulated an unmistakable departure in methodology. Justice Scalia, joined by Justice O'Connor, recently stated his belief that Touche Ross had effectively overruled *Cort. Thompson v. Thompson*, 484 U.S. 174, 199, 98L. Ed. 2d 512, 108 S. Ct. 513 (1988). However, a majority of the Supreme Court has yet to adopt such a clear break from the past, and its and other federal courts' continued reference to the Cort v. Ash factors suggests that they still hold some persuasive sway. Given the doctrine's uncertainty, the court briefly addresses each factor with respect to the NRSA grant program.

the underlying purposes of the legislative scheme.[15] Because no implied cause of action exists under the Act, Counts Two and Four will be dismissed.

IV. Administrative Procedure Act (Count Three)

Mr. Dobkin states in his complaint that on September 21, 1992, the NIA, based on Dr. German's representations, terminated his NRSA traineeship. Contending that the NIA accepted Dr. German's recommendation "despite evidence that [she had] deliberately misrepresented [his] academic record and that Hopkins [had] violated NIA and NIH regulations and Constitutional due process requirements," Complaint P 164, Mr. Dobkin seeks judicial review of the agency's decision.

Under the Administrative Procedure Act ("APA"), administrative agencies' actions are generally subject to judicial review, and must be set aside if deemed to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" 5 U.S.C. § 706(2)(A), or "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. § 706(2)(B). See generally *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). However, the APA expressly precludes judicial review when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). "Section 701(a)(2) states a very narrow exception to the mandate of the APA that the action of each authority of the Government of the United States is subject to judicial review." *Id.* at 410. Administrative agencies bear "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the agency's] decision." *Dunlop v. Bachowski,* 421 U.S. 560, 567, 44 L. Ed. 2d 377, 95 S. Ct. 1851 (1975). Section 701(a)(2)'s

15. Thus, the first three Cort factors militate against creating a private cause of action. While the administration of federal NRSA grants has not "traditionally been relegated to state law, in an area basically the concern of the States," Mr. Dobkin is not without legal remedies. As discussed in Part II, he may seek relief for the allegedly improper way his traineeship was terminated under the Constitution's Due Process Clause. As discussed below, he may also pursue state common law tort and breach of contract claims.

judicial review exemption applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park,* 401 U.S. at 410.

As discussed in Part II, the NIA/NIH, despite its delegation of the administration of Mr. Dobkin's traineeship to JHU, may have been constitutionally obligated to ensure that JHU did not deprive Mr. Dobkin of due process. To the extent that Mr. Dobkin's constitutional claims against the Federal Defendants rest on the NIA's decision to accept Dr. German's recommendation, his attempt to secure judicial review under the APA is duplicative of his claims in Count One.

However, to the extent that Mr, Dobkin is contending that the NIA's decision to accept Dr. German's recommendation, although not unconstitutional, was nevertheless "arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law," his claim falls prey to § 701(a)(2). While the APA permits action against an agency even when there is no implied right of action, see *Chrysler Corp. v. Brown,* 441 U.S. 281, 317, 60L. Ed. 2d 208, 99 S. Ct. 1705 (1979); *Sierra Club v. Hodel,* 848 F.2d 1068, 1076 (10th Cir. 1988), neither the Public Health Service Act, nor the regulations implementing the NRSA program, prescribe standards which the NIA must follow when public or nonprofit private institutions decide to terminate a particular NRSA recipient. To the contrary, institutions administering NRSA funds select recipients, 42 U.S.C. § 288(a)(1)(B), 42 C.F.R. § 66.204(b)(4), monitor and evaluate their performance, 42, C.F.R. § 66.204(b)(7), and have the authority to terminate awards if they find that recipients have "materially failed to comply with the terms and conditions of the Award or to carry out the purpose for which it was made." 42 C.F.R. § 66.205(a)(3). Finally, the regulations authorize HHS to "impose additional conditions prior to or at the time of any award when in the Secretary's judgment such conditions are necessary to assure the carrying out of the purposes of the award, the interests of public health or the conservation of the funds awarded," 42 C.F.R. § 66.115 (emphasis added).

Mr. Dobkin does not contend that the NIA, prior to or at the time it granted JHU the NRSA funds, placed terms or

conditions on JHU's termination of individual recipients other than providing JHU with the right to terminate should JHU, in its judgement, determine that recipients had "materially failed to comply with the terms and conditions of the Award or to carry out the purpose for which it was made." Moreover, nothing in JHU's grant proposal suggests that the NIA was to review termination decisions, let alone establishes standards by which such review could be carried out. Finally, there is no indication that the NIA obligated itself to scrutinize JHU's termination decisions.

An objective reading of the statute and the regulations promulgated thereunder does not preclude the possibility that the NIA, under the institutional grant program, upon receipt of Dr. German's termination letter, could have ordered JHU to reinstate Mr. Dobkin. However, even if such authority existed, Congress left the decision to exercise it to the NIA's descretion. "Since Congress by its silence, left to [HHS'] discretion to deterermine when and how it would exercise its general oversight authority,. . . [the Court will] defer to the agency's reasonable interpretation of its duties." *Dorsey,* 984 F.2d at 633 (citing *Monongahela Power Co. v. Reilly,* 980 F.2d 272 (4th Cir. 1992)). Because the only viable APA claim is duplicative of Mr. Dobkin's constitutional claim, Count Three will be dismissed.

V. Defamation (Count Five)

Although Mr. Dobkin has sued each of the Hopkins Defendants for defamation, with respect to Professors Rowland, Roter and Kasper, his conclusory allegations lack specificity. Unlike his particularized accusations of Dr. German and Estelle Fishbein, Mr. Dobkin does not claim that the other individual Hopkins Defendants made specific defamatory comments about him. The broad-brushed contention that Professors Rowland, Roter and Kasper "participated in a smear campaign against him," absent any specification of the time, place or content of such alleged comments, even under liberal pleading requirements, fails to state a claim for defamation. See *Schoonfield v. Baltimore,* 399 F. Supp. 1068, 1090 n. 29

(D.Md. 1975); *Meromedia, Inc. v. Hillman*, 285 Md. 161, 172, 400 A.2d 1117 (1979). Nor does his conclusory assertion that the Hopkins Defendants "passed on damaging rumor, gossip and innuendo about his now failed marriage . . . which reflect adversely on his psychological stability, morality and fitness" (Complaint ¶¶ 144, 145) pass pleading muster. Finally, any contention that Professors Rowland, Roter and Kasper, as members of the Advisory Panel, defamed Mr. Dobkin by virtue of Dr. German's representations on the NIA termination notice, in the absence of any indication that they knew about and acquiesced in Dr. German's comments, is farfetched. For these reasons, Mr. Dobkin's claims of defamation against Professors Rowland, Roter and Kasper will be dismissed.[16]

VI. Breach of Contract (Count Six)

Mr. Dobkin contends that JHU is obligated, by contract, to award him a Masters in Public Health ("M.P.H."). Contrary to the Hopkins Defendants' characterzation of his claims, Mr. Dobkin has not alleged that he has a contractual right to, or guaranty of, successful completion of the M.P.H. program; rather, he asserts that he has already satisfied the degree requirements and paid his tuituin but JHU, in violation of the contractual obligations established by its own bulletins and regulations, has refused to confer the degree.

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16. Mr. Dobkin may amend his complaint to state claims for defamation against Defendants Rowland, Roter and Kasper without leave of court. Pursuant to Fed.R.Civ.P. 15(a), a party may amend a pleading, as a matter of right, before a responsive pleading is filed; a motion to dismiss, for purposes of Rule 15(a), is not a responsive pleading. *Smith v. Blackledge*, 451 F.2d 1201, 1203 n. 2 (4th Cir. 1971); *see also* 6 Charles A. Wright et al., Federal Practice and Procedure, § 1483 at 584-585 (2d ed. 1990). Although JHU, Dr. German and Estelle Fishbein filed an answer to Mr. Dobkin's defamation claim, Professors Rowland, Roter and Kasper filed only a Motion to Dismiss.

Mr. Dobkin is not required to seek leave to amend his complaint even though the Court, with respect to Count five, has granted the Defendants' motion to dismiss. However, if he chooses to support his claims with facts, he is obligated to do so within a reasonable period of time. *Id.* at 588. Any amendments must be submitted within 30 days of the issuance of this Memorandum Opinion.

JHU cannot avoid contractual liability through a Rule 12(b)(6) motion to dismiss; the viability of Mr. Dobkin's contractual claim to a M.P.H. degree is quintessentially a question of fact. However, the individual Hopkins Defendants — Dr. German, Estelle Fishbein, and Professors Rowland, Roter and Kasper — cannot, as a matter of law, be held responsible, as JHU employees or agents, for JHU's alleged contractual obligation. *Ace Development Co. v. Harrison,* 196Md. 357, 366, 76 A.2d 566 (1950). Therefore, Count Six, inasmuch as it seeks to hold the individual Hopkins Defendants liable, will be dismissed.

VII. Tortious Interference with Contractual Relations (Count Seven)

Characterizing his relationship with the NIA/NIH in contractual terms, Mr. Dobkin alleges that the Hopkins Defendants have deliberately sabotaged the relationship by "misrepresenting his academic record, by advising the Federal Defendants to terminate [his] traineeship without reasonable justification, and by spreading . . . false charges [about him]." Complaint ¶ 183. Despite the Hopkins Defendants' protestations to the contrary,[17] section 288(a)(1)(B)'s institutional NRSA grant scheme creates a three part contractual arrange-

17. The Hopkins Defendants impliedly urge the Court to adopt the following harsh syllogism; the arrangement between the NIA, JHU and Mr. Dobkin is the product of statute not contract; because the relationship is not "contractual," any interference with it, no matter how egregious, cannot constitute interference with "contractual relations." In support of their position, the Hopkins Defendants misconstrue *United States v. Rendleman,* 860 F.2d 1537 (9th Cir. 1988) and *United States v. Ledwith,* Slip Op. No. 92-2613, (4th Cir., July 14, 1993). Rather than holding that the National Health Service Corps Scholarship program, which like the NRSA program, entails an exchange of service for financial support, does not embody a contractual arrangement, Rendleman and Ledwith simply establish that interpretation of the terms of such arrangements rests with rules of statutory, as opposed to contractual, construction. While the terms of the NRSA, rather than being negotiated on a case by case basis, are established by statute, the quid pro quo arrangement, freely entered into, constitutes a binding contract.

The harshness of the Hopkins Defendants' argument is magnified in light of the vulnerable position NRSA recipients occupy after the first year of support but before receiving their degree. Unlike typical installment con-

ment: HHS provides funding for training to public and non-profit private institutions so that promising young scientists can study there; in consideration, such young scientists promise the federal government to engage in health related research after they complete their training. Under such an arrangement, the institutions administering NRSA funds are parties to the contract.

In Maryland, "a third party who, without legal justification, intentionally interferes with the rights of a party to a contract, or induces breach thereof, is liable in tort to the injured contracting party." *Wilmington Trust Co. v. Clark,* 289 Md. 313, 329, 424 A.2d 744 (1981). Because JHU is a party to his NRSA arrangement, Mr. Dobkin cannot sue it for tortious interference. Instead, he may initiate a claim for breach of contract encompassing his allegation that JHU, as a party to the contract, violated his contractual rights. *Id.* Consequently, Count Seven, as it pertains to JHU, will be dismissed; Mr. Dobkin is free, however, to amend his complaint so as to frame his allegations under a breach of contract claim. *See supra* note 16.

Additionally, Mr. Dobkin's claim for tortious interference against the individual Hopkins Defendants – other than Dr. German and Professor Kasper – must be dismissed. "When an employee acts within the scope of her employment, or as an agent of her employer, she cannot be held liable for interfering with the contract, business relationships or economic

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tracts, NRSA recipients do not enjoy the full benefits of their bargain until they finish their training. In essence, they have bargained for a balloon payment at the end of the NRSA support. NRSA recipients are obligated to pay the government back through service, service which they may not be qualified to perform until they complete their training. Not only may a NRSA recipient who is terminated midway through his or her studies be unable to pay off whatever debt has accrued through service, but without a degree, he or she may be unable to secure employment to pay off the debt monetarily.

The common law of Maryland protects NRSA recipients from wrongful interference with continued enjoyment of their traineeships. When such interference is at the hands of a party to the arrangement, a breach of contract claim will lie; if a third party interferes, a claim for tortious interference arises.

relationships, between the employer and another." *Continental Casualty Co. v. Mirabile*, 52 Md. App. 387, 402, 449 A.2d 1176 (1982); *Borowski v. Vitro Corp.*, 634 F. Supp. 252, 258 (D.Md. 1986).[18] In order to hold an employee liable for the tortious interference with her employer's contractual relations, a plaintiff must "allege that the corporate officers acted out of 'personal motive and without intent to further the interest of their [corporate] principal.' " *Bleich v. Florence Crittenton Services of Baltimore*, 98 Md.App. 123, 148, 632 A.2d 463 (1993), citing *George A. Fuller Co., Div. of Northrop Corp. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1333 (7th Cir. 1983)). Mr. Dobkin has alleged that Dr. German and Professor Kasper, in deciding to terminate his traineeship, acted out of personal motive without the intent to advance the School's or JHU's interests; consequently, he may pursue his tortious interference claims against them.

VIII. Misrepresentation (Count Eight)

In Count Eight, Mr. Dobkin contends that "the Hopkins Defendants in general, and Dr. German in particular, . . . misrepresented [his] academic record and progress to persons at [the] NIA and/or [the] NIH . . . with the intention of creating the false impression that [he] was academically unfit." Complaint ¶ 187. On its face, Mr. Dobkin's allegation misconstrues the tort of misrepresentation, confusing it with defamation.

> In order to establish a cause of action for fraud under Maryland law, a plaintiff must allege and prove that: (1) a representation made by a party was false; (2) its falsity was either known to the party or made with such reckless indifference to the truth to impute knowledge; (3) the misrepresentation was made for the purpose of defrauding some other person; (4) that person reasonably acted in reliance

18. For the reasons discussed in Part VI, the individual defendants cannot be held responsible for a breach of a contract entered into by their employer. Therefore, any attempt by Mr. Dobkin to amend his complaint to allege a breach of contact claim against the individual defendants for alleged "sabotage" would be futile.

> upon the misrepresentation with full belief in its truth, and he would not have done the thing from which damage resulted had it not been made; and (5) the person so acting suffered damage directly resulting from the misrepresentation.

Learning Works, Inc. v. Learning Annex, Inc., 830 F.2d 541, 545-546 (4th Cir. 1987) (citing *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 629 (4th Cir.), cert. denied, 434 U.S. 923, 54 L. Ed. 2d 280, 98 S. Ct. 400 (1977)). *See also E.F. Hutton Mortg. Corp. v. Equitable Bank, N.A.*, 678 F. Supp. 567, 580 (D.Md. 1988); *Equitable Trust Co. v. G & M Construction Corp.*, 544 F. Supp. 736, 744 (D.Md. 1982).

Recognizing that allegedly misleading statements made to third parties cannot constitute actionable misrepresentation, Mr. Dobkin attempts to resuscitate Count Eight by incorporating the other 185 paragraphs of his complaint by reference. In particular, Mr. Dobkin contends:

> (1) that the Hopkins Defendants misrepresented what would be tested on his oral examination;
> (2) that Dr. German represented that, during its June 24, 1992 meeting, the Advisory Panel would be concerned only with the amount of time Mr. Dobkin would be allowed to retake his oral examination;
> (3) that Dr. German induced him to sign a traineeship appointment form by contending that the traineeship would last another year.

At the outset, Mr. Dobkin's reconstructed allegations implicate none of the individual defendants except Dr. German and Professor Rowland; thus Count Eight will be dismissed with respect to Estelle Fishbein, Professor Roter and Professor Kasper.

Mr. Dobkin's contention that Professor Rowland led him to study a subject on which she ultimately chose not to test him, fails to state a claim for misrepresentation. Mr. Dobkin has not made the allegation that Professor Rowland intended to defraud him by misrepresenting the focus of her oral examination. Similarly, Mr. Dobkin fails to explain how Dr. Ger-

man's alleged representation that the Advisory Panel was going to address only the rescheduling of his oral examination induced him into detrimental reliance; nor does he claim that such representation was made with the intent to defraud. Finally, Mr. Dobkin fails to describe how he relied to his detriment on Dr. German's alleged statement that the June 24, 1992 traineeship renewal was for a one year period. For these reasons, Count Eight, in its entirety, will be dismissed.

Conclusion

Although the Court will permit Mr. Dobkin to pursue his constitutional due process claim against both the Hopkins Defendants and the Federal Defendants and to pursue several state common law claims against the Hopkins Defendants, it reserves the right to revisit the legal sufficiency of his claims once the parties, through discovery, have assembled a complete factual record. In accordance with this Memorandum Opinion, it will be so ordered.

Dated: January 25, 1994.

John R. Hargrove

United States District Judge

ORDER — January 25, 1994, Filed; February 1, 1994, Entered

This twenty-fifth (25th) day of January, 1994, it IS, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendants' Motions to Dismiss BE, and the same hereby ARE, GRANTED IN PART and DENIED IN PART:

(a) That Plaintiff's claims against The Johns Hopkins University School of Hygiene and Public health ("the School") BE, and the same hereby ARE, DISMISSED;

(b) That the NIA/NIH's ("the 'Federal Defendants' ") Motion to Dismiss for lack of standing BE, and the same hereby IS, DENIED;

(c) That the Plaintiff's claim that he was

deprived of a constitutionally protected liberty interest without due process of law BE, and the same hereby IS, DISMISSED;

(d) That the Plaintiff's claims for relief under the Public Health Service Act, 42 U.S.C. § 201 et seq., (Counts Two and Four) BE, and the same hereby ARE, DISMISSED;

(e) That the Plaintiff's claim for relief under the Administrative Procedures Act, 5 U.S.C. § 701 et seq., (Count Three), BE, and the same hereby IS, DISMISSED.

(f) That the Plaintiff's claims against Defendants Rowland, Roter and Kasper for defamation (Count Five) BE, and the same hereby ARE, DISMISSED.

(g) That the Plaintiff's claims against Defendants German, Fishbein, Rowland, Roter and Kasper for breach of contract (Count Six) BE, and the same hereby ARE, DISMISSED.

(h) That the Plantiff's claims against Defendants JHU, Fishbein, Rowland and Roter for tortious interference with contractual relations (Count Seven) BE, and the same hereby ARE, DISMISSED;

(i) That the Plaintiff's claims for misrepresentation (Count Eight) BE, and the same hereby ARE, DISMISSED.

2. That the Clerk of the Court MAIL copies of this Order and the attached Memorandum Opinion to all parties of record.

John R. Hargrove
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT S. DOBKIN,	:	
Plaintiff,	:	Civil Action No. HAR 93-2228
v.	:	
	:	(consolidated with)
THE JOHNS HOPKINS	:	Civil Action No. HAR 94-2656
UNIVERSITY, ET AL.,	:	
Defendants.	:	Civil Action HAR No. 95-813

MEMORANDUM AND ORDER

On July 30, 1993, Robert S. Dobkin ("Mr. Dobkin") instituted Civil Action No. HAR 93-2228 against The Johns Hopkins University ("JHU") and several JHU officials[1] (at times collectively referred to as "the Hopkins Defendants"), alleging constitutional and common law claims in connection with the termination of his traineeship at JHU's School of Hygiene and Public Health.[2] Claiming Mr. Dobkin and his parents knowingly made and disseminated false and defamatory statements about them, three of the Hopkins Defendants—JHU, Dr. German, and Ms. Fishbein—counterclaimed against Mr. Dobkin in the original action, and filed a separate suit against Mr. Dobkin's parents, Donald and Rosalyn Dobkin, Civil Action No. HAR 94-2656. Then, in March 1995, Mr. Dobkin brought a separate defamation action against Rand H. Fishbein, the son of Ms. Fishbein, Civil Action No. HAR 95-813. The Court has consolidated the two subsequent civil actions with the original suit.

Now, after the close of discovery, the Hopkins Defendants seek summary judgment on the remaining counts in Mr. Dobkin's complaint. Similarly, Rand Fishbein has filed a

1. Only three JHU officials remain in the case: Dr. Pearl German, Vice President of JHU ("Dr. German"), Dr. Judith Kasper, Associate Professor in the Department of Health Policy and Management in JHU's School of Public Health and Hygiene ("Dr. Kasper"), and Estelle Fishbein, General Counsel for JHU ("Ms. Fishbein").

2. Mr. Dobkin also sued The National Institute of Health ("NIH") and The National Institute of Aging ("NIA"). Both parties have been dismissed from the action. *See* Paper No. 103.

motion for summary judgment on the defamation claim filed by Mr. Dobkin., In turn, Mr. Dobkin and his parents have moved for summary judgment on each of the claims brought by the various Hopkins Defendants. The Court has reviewed the complaint, the parties' respective memoranda and the exhibits attached thereto; no hearing is deemed necessary. Local Rule 105(6)(D. Md. 1993).

BACKGROUND

In February 1990, JHU's School of Hygiene and Public Health accepted Mr. Dobkin, who suffers from Stevens-Johnson Syndrome, as a doctoral candidate in its Department of Health and Policy Management. Concurrently, Mr. Dobkin was admitted as a certificate candidate in the School of Public Health's Interdepartmental Gerontology in Public Health Program (the "Gerontology Program"). Thereafter, Mr. Dobkin successfully applied for appointment to a research training program established for the Gerontology Program for the 1990-91 year.[3]

In August 1990, Mr. Dobkin formally began his studies at JHU with Dr. German[4] serving as his faculty advisor. *See* Faculty Advisor Appointment, Exhibits to Memoranda of The Hopkins Defendants for Summary Judgment, Exh. 11. Upon entry into JHU, Dr. German permitted Mr. Dobkin to waive several course credits.[5] Mr. Dobkin proceeded with the first

3. The Public Health Service Act, 42 U.S.C. §§ 201 *et seq.*, authorizes the Department of Health and Human Services ("HHS") to "provide National Research Service Awards for predoctoral . . . training at public and private institutions of individuals to undertake biomedical and behavioral research." 42 U.S.C. § 288(a)(1)(A)(iv). Under the National Research Service Award ("NRSA") program, HHS may make awards directly to promising young scientists, 42 U.S.C. § 288(a)(1)(A), or may "make grants to public and nonprofit private institutions to enable such institutions to make National Research Service Awards." 42 U.S.C. § 288 (a) (1) (B).

4. Dr. German helped design, set-up, and direct the Hopkins traineeship program connected with the Gerontology program and was the principal investigator for the NIA grant. *See* Deposition of Pearl German, Exhibits to Memoranda of Hopkins Defendants for Summary Judgment, Exh. 4 ("German Deposition"), at 44-48.

5. According to Dr. German, she allowed Mr. Dobkin to waive credits

year of his courses and, on June 11, 1991, took and passed the departmental comprehensive written examination.[6]

From early 1991 through the first quarter of 1992, Mr. Dobkin worked with Dr. German on designing a proposal for dissertation. In early 1992, however, the relationship between Dr. German and Mr. Dobkin began deteriorating. Mr. Dobkin alleges Dr. German advised him that he was going too fast and that completing the program in such a short period of time would "devalue" Dr. German's program and the NIA grant. *See* Dobkin Aff., at ¶ 16. Further, according to Mr. Dobkin, Dr. German demanded several unnecessary revisions to his dissertation proposal, *id.*, and refused his requests to take the preliminary departmental oral examination[7] ahead of schedule. *Id.*, at ¶ 18. Mr. Dobkin wished to take this exam early so he could move as quickly as possible to complete his degrees and proceed with his career. *Id.*

In February and March 1992, Mr. Dobkin expressed his problems with Dr. German to Dr. Karen Davis, chair of the Health Policy Department, and Dr. Barbara Starfield, chair of the Curriculum Committee for the Health Policy Department. *See* Starfield 4/8/92 Memorandum, Exhibits to Memoranda of

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believing Mr. Dobkin had covered the content of the courses at Yale University, where Mr. Dobkin received a double certification in Public Health Administration and Chronic Disease Epidemiology. *See* German Deposition, at 311.

6. Mr. Dobkin claims Dr. German attempted to dissuade him from taking the June, 1991, examination, stating if Dobkin passed "it would be an indication that 'they', at the School, 'had nothing to teach [him] , ' since [he] was taking them so quickly." Affidavit of Robert Dobkin, Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ("Dobkin Aff."), at ¶ 11.

7. The purpose of the preliminary oral examination is to assess students at an earlier stage of progress for the doctoral degree to determine whether the student has the ability and knowledge to undertake research in his general area of interest. *See* Department of Health Policy and Management Departmental Handbook, Exhibits to Memoranda of Hopkins Defendants for Summary Judgment, Exh. 2 ("Departmental Handbook"), at 39-40. Generally, the examiners use the student's dissertation proposal to test the student's general knowledge and research capacity. *Id.* Successful completion of the departmental oral examination is necessary before a student can proceed with his or her dissertation.

The Hopkins Defendants for Summary Judgment, Exh. 34 ("Starfield 4/8/92 Memo"). Around the same time, Dr. German also spoke with Dr. Starfield concerning Mr. Dobkin, complaining that Mr. Dobkin was unreceptive to her advice and lacked the necessary training to handle his proposed studies. *Id.*; German Deposition, at 227-29 & 231. Additionally, Dr. German noted that, based on her observations, Mr. Dobkin was not prepared to sit for the departmental preliminary oral examination. *Id.*

In an attempt to deal with the problems between Mr. Dobkin and Dr. German, Dr. Starfield suggested that Dr. German continue as Mr. Dobkin's advisor without prejudice, and agreed to allow Mr. Dobkin to take his departmental exam with an impartial group of faculty members. *See* Starfield 4/8/92 Memo. Subsequently, however, the advisor-advisee relationship between Dr. German and Mr. Dobkin ended.[8] Lacking an advisor, Mr. Dobkin was prohibited from taking his preliminary oral examination. *See* Departmental Handbook, at 39-40. Consequently, in April 1992, Mr. Dobkin began searching for a replacement for Dr. German. Having difficulty securing an advisor in the gerontology department, Mr. Dobkin selected Dr. Arthur Freed, a professor in the Department of Environmental Health. *See* Dobkin Aff. at ¶ 21; Dobkin Memorandum to Judy Holzer, Exhibits to Memoranda of The Hopkins Defendants for Summary Judgment, Exh. 35. Mr. Dobkin then set a June 15, 1992 date for his departmental oral exam and a June 22, 1992 date for his schoolwide, interdepartmental oral exam.[9] *See* Notice of Dobkin's Departmental Preliminary Oral Examination, Exhib-

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8. The parties dispute who instigated the termination of the relationship. Mr. Dobkin claims Dr. German informed him on April 7, 1992 that she would no longer serve as his advisor. *See* Dobkin Memorandum to File, Opposition to Defendants' Motion for Summary Judgment, Exh. 2. Dr. German and Dr. Starfield assert Mr. Dobkin fired Dr. German as his advisor. *See* German Deposition, at 257-58; Starfield 4/8/92 Memo.

9. A student must first take and successfully complete the departmental preliminary oral examination prior to sitting for the school-wide, interdepartmental preliminary oral. *See* Departmental Handbook, at 39.

its to Memoranda of Hopkins Defendants for Summary Judgment, Exh. 36 ("Examination Notice").

On June 15, 1992, Mr. Dobkin sat for the departmental examination with Dr. Starfield, Dr. Diane Rowland, Dr. Larry Brant, and Dr. Freed as his panel members.[10] Unfortunately, Mr. Dobkin failed the examination.[11] Subsequently, on June 24, 1992, Dr. German convened a meeting of the interdepartmental gerontology "Advisory Panel" that, in addition to Dr. German, consisted of Dr. Diane Rowland, Dr. Debra Roter and Defendant Dr. Judith Kasper. The panel voted to terminate Mr. Dobkin's traineeship.[12] One month later, on July 21, 1992, Dr. German transmitted a "NRSA Termination Notice" to the NIA. In the section under the form's statement, "if a fellowship or training appointment is being terminated *early*," (emphasis added), Dr. German explained:

> In the second year of training, Mr. Dobkin sat for and passed his Departmental written examination. His scores were passing but only fair and included scores of 3 (minimal pass) on two questions . . . . His major activity during this year was designing a proposal for a dissertation and he had great difficulty with this. He was unable to grasp the essentials of designing a research project, of handling a data set

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10. According to departmental regulations, the student has the duty to select and secure the panel committee members. *See* Departmental Handbook, at 39. Dobkin himself chose the panels for his examination. Also consistent with departmental regulations, Mr. Dobkin supplied the panel with the thesis protocol that he had worked on with Dr. German. *See* Examination Notice.

11. Mr. Dobkin alleges that his oral examination was administered unfairly; specifically, Mr. Dobkin maintains that during the oral examination, all the doctors except Dr. Freed, questioned him on subjects different from those they had represented would be tested. Dobkin Aff., at ¶ 22. Mr. Dobkin also complains that he was not afforded the opportunity to retake the examination; an opportunity, he claims, other Hopkins' students have been given as a matter of course. *Id.*, at ¶ 45.

12. The School did not dismiss Mr. Dobkin from either the doctoral program or the interdepartmental gerontology certificate program. It did, however, require him to pay his own tuition and expenses. *See* Letter of Dr. Pearl German, Exhibits to Memoranda of Hopkins Defendants for Summary Judgment, Exh. 40, at 2, ¶ 1.

> with which to carry out the project, of organizing an analytic plan for the project. Mr. Dobkin subsequently failed his departmental oral examination which precedes the school-wide departmental oral examination which precedes the school-wide orals required before the student can begin dissertation work. The departmental examiners felt there were serious gaps in his knowledge of the most basic concepts of social policy and gerontology. An advisory panel met to consider the entire situation and voted unanimously to discontinue his traineeship.

Based on the explanation given by Dr. German, on September 21, 1992, the NIA officially terminated Mr. Dobkin's NRSA.[13]

Subsequently, Mr. Dobkin's parents, Donald and Rosalyn Dobkin, wrote to Hillary Clinton[14], Vice President Al Gore[15], and Senator Robert Dole[16], concerning their son's experience

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13. Mr. Dobkin decided not to continue with his doctoral degree at JHU, because he was dependent "upon the economic benefits of the grant." Dobkin Aff., at ¶ 45.

14. The letter to Hillary Clinton, dated November 20, 1992, provided, in pertinent part:

> "[o]ur son, a Yale alumnus (M.P.H. 86), has been academically and apparently irremediably destroyed as a 'reward' for his hard work, dedication, integrity and scholarship — the recipient of premeditated misconduct, cover-up and fraudulent grant administration at the highest bureaucratic levels of Johns Hopkins University and involving the National Institutes of Health."

Letter to Hillary Clinton, Hopkins Defendants' Complaint, Exh. A, at ¶ 4.

15. In their April 27, 1993 letter to Vice President Gore, Mr. Dobkin's parents explained:

> "Last November (with no response to date), we wrote to Hillary Clinton requesting any possible assistance in a matter concerning waste and misuse of government funding (the National Institute of Health) and the premeditated academic assassination of our son, Robert Dobkin, and subsequent cover up at the Johns Hopkins University School of Hygiene and Public Health...."

Letter to Vice President Al Gore, Hopkins Defendants' Complaint, Exh. A, at ¶ 2.

16. Nothing defamatory is alleged in the letter to Senator Dole; however, Mr. Dobkints parents attached copies of the letters to Hillary Clinton and Vice President Gore. *See* Letter to Senator Robert Dole, Hopkins Defendants' Complaint, Exh. A.

at JHU. Mr. Dobkin also wrote letters to Ross Perot[17], Dr. Thomas Sowell, fellow at the Hoover Institution at Stanford University,[18] and attorney William Kunstler. None of these individuals assisted Mr. Dobkin or his parents.

Finally, after several unsuccessful attempts to reverse the termination decision, on June 4, 1993, Mr. Dobkin filed the present suit. *See* Dobkin Aff., at ¶ 26. Over the past two years, the case has been significantly streamlined. *See* Paper Nos. 31, 102. Three claims remain against Defendant JHU: defamation, false light invasion of privacy, and breach of contract. Three claims remain against Dr. German: defamation, false light invasion of privacy, and tortious interference with contract. Three claims remain against Ms. Fishbein: defamation, false light invasion of privacy, and tortious interference with contract. One claim for tortious interference with contract remains against Dr. Kasper. And Mr. Dobkin's sole claim for defamation remains against Defendant Rand Fishbein. Each of these Defendants has moved for summary judgment. Mr. Dobkin and his parents have also filed Motions for summary judgment on the defamation claims filed by JHU, Dr. German and Ms. Fishbein. The Court will address each in turn.

DISCUSSION

In considering each parties respective motion for summary judgment, the Court views the underlying facts and all reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment. *Matsushita*

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17. In his April 8, 1993 letter to Mr. Perot, Mr. Dobkin explained:

> ". . .MY NIH grant was administered fraudulently by Johns Hopkins, my records were slandered, the NIH now threatens suit Against me and refuses to investigate any written allegation of corruption and lies and correspondences and actions by Johns Hopkins with NIH officials to ruin me."

Perot Letter, Hopkins Defendants' Complaint, Exh. A, at ¶ 4.

18. In his letter to Dr. Sowell, dated March 29, 1993, Mr. Dobkin contended:

> "I have been annihilated and my research career completely stymied by Johns Hopkins University in a matter involving fraudulent grant administration with the National Institutes of Health."

Dr. Sowell Letter, Hopkins Defendants' Complaint, Exh. A, at ¶ 1.

Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Affidavits or other evidence offered by the party opposing the motion must create a genuine issue for trial; summary judgment will not lie if the opponent's evidence is "merely colorable" or anything short of "significantly probative" on a material issue. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986). Simply showing a disputed issue of fact is insufficient. *Id.* at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment.").

I. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

As outlined above, only four causes of action remain against the various defendants: defamation, false light invasion of privacy, breach of contract, and tortious interference with contract.

A. Defamation

To establish a defamation claim under Maryland law, a plaintiff must prove "that the defendant made a defamatory communication to a third person; that the statement was false; that the defendant was legally at fault in making the statement; and that the plaintiff thereby suffered harm." *Rosenberg v. Helinski*, 328 Md. 664, 675 (1992), *cert, denied*, 113 S. Ct. 3401 (1993). As the Maryland Court of Appeals has explained, "[a] defamatory statement is one which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person." *Batson v. Shiflett*, 325 Md. 684, 722-23 (1992) (internal citations omitted). If a statement is "capable or more than one meaning or a defamatory meaning could be inferred, then the meaning to be attributed to [the statement] is a question of fact for the jury." *Id.*

1. Dr. Pearl German

Mr. Dobkin claims Dr. German defamed him by (1) stating that he "sexually harassed" her, and (2) misinforming

Robin Fox, an assistant to Senior Associate Dean for the School of Hygiene and Public Health Scott Zeger, about his bladder cancer.[19]

The first statement arises out of an alleged incident where, according to Dr. German, Mr. Dobkin "exposed" himself.[20] Dr. German concedes that she discussed the supposed "exposure" incident with Maureen Hayes, the department administrator, Dr. Paul McHugh, JHU psychiatrist, Ms. Fishbein, and Dean Zeger. Dr. German argues, however, that she had a duty to inform these individuals of this type of matter; thus, conditional privileges preclude any defamation claim.

In Maryland, "a communication is conditionally privileged when the circumstances induce a reasonable belief that the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the general standards of decent conduct." *Hanrahan v. Kelly*, 269 Md. 21, 31 (1973). In his response motion, Mr. Dobkin chooses not to refute Dr. German's claim that her statement was conditionally privileged. Instead, Mr. Dobkin contends that Dr. German did more than merely recount the incident to these individuals; according to Mr. Dobkin, Dr. German informed Hayes and Fishbein that the incident constituted "sexual harassment." Because Dr. German knew Mr. Dobkin's behavior was not

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19. In his interrogatory answers, Mr. Dobkin claimed eighteen separate statements constituted actionable defamation. Aside from the two statements relied on in his response motion, however, Mr. Dobkin has failed to proffer any support for his claims, much less support raising a genuine issue of material fact. The Court will therefore grant Dr. German's motion for summary judgment as to those statements charged against her for which Mr. Dobkin failed to respond to in his reply memoranda.

20. According to Dr. German, Mr. Dobkin appeared for a meeting in her office wearing abbreviated shorts, with no apparent underwear, sat down in a chair, and pushed back in the chair; thus exposing himself to her. German Deposition, at 448-49. Mr. Dobkin claims such a incident never could have happened because he was required to, and still does, wear tight fitting orthopedic support undergarments to preclude testicular movement as a result of a bladder cancer operation. Dobkin Aff., at ¶ 23.

sexually harassing,[21] Mr. Dobkin argues Dr. German's made her statement with malice, thus nullifying any conditional privilege .[22]

In support of his contention that Dr. German stated he sexually harassed her and therefore acted maliciously, Mr. Dobkin relies on the deposition testimony of Maureen Hayes and Andrew Graham, Mr. Dobkin's former counsel. Neither of these individuals, however, provide support for Mr. Dobkin's claim. In her deposition, Ms. Hayes states that Dr. German informed her of the facts surrounding the alleged exposure incident. *See* Deposition of Maureen Hayes, Exhibits to Memoranda of Hopkins Defendants for Summary Judgment, Exh. 8 ("Hayes Deposition"), at 80. However, Ms. Hayes never claims *Dr. German* used the words sexual harassment when recounting the incident. Although Ms. Hayes and opposing counsel may have interpreted the episode as sexual harassment, there is no evidence that Dr. German referred to it as such. Similarly, in his deposition, Mr. Graham testifies that *Ms. Fishbein* told him Mr. Dobkin sexually harassed Dr. German, not that Dr. German used those words. *See* Deposition of Andrew Graham, Dobkin Response to Hopkins Defendants' Motion for Summary Judgment, Exh. 6 ("Graham Deposition"), at 29-30, 32-33. Nothing in Mr. Graham's testimony indicates that Dr. German ever stated to Ms. Fishbein or anyone that Mr. Dobkin's actions constituted sexual harassment. *Id.*

After careful review of the record, Mr. Dobkin has provided no evidence that Dr. German described the incident as sexual harassment. The deposition testimony relied on by Mr.

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21. In support of this contention, Mr. Dobkin cites to Dr. German's deposition where she admits that she did not consider Mr. Dobkin's exposure of his genitals to be sexual harassment. *See* German Deposition, at 447.

22. Mr. Dobkin is correct that mere negligence as to falsity, which is required for all actions of defamation, is not sufficient to constitute abuse of a conditional privilege. Instead, a conditional privilege can be overcome only by a showing of actual malice. *Marchesi vs. Franchino*, 283 Md. 131, 139 (1978). Proving actual malice requires "clear and convincing evidence that a statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " *Batson v. Shiflett*, 325 Md. at 728 (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

Dobkin shows Dr. German recounted the episode to the named individuals exactly as she perceived it, not as sexual harassment.[23] Without evidence that Dr. German acted at least recklessly in describing the incident, Mr. Dobkin has not satisfied his burden. Accordingly, the Court will grant Dr. German's Motion for Summary Judgment on this aspect of Mr. Dobkin's defamation claim.

The second statement relied on by Mr. Dobkin in support of his defamation claim against Dr. German is a statement made by Dr. German to Robin Fox, assistant to the Dean of the School of Hygiene and Public Health at JHU. The statement, which was put in Mr. Dobkin's file, reads as follows:

> "While at Hopkins, Mr. Dobkin disclosed to a number of people that had been earlier diagnosed with cancer of the urinary bladder. In the statement of objective section of his application, he states that he was diagnosed with cancer (type not mentioned) in 1983 and was treated at Sloan Kettering. *According to Dr. German, Dr. Dan Ford examined Mr. Dobkin at our Student Health Center and mentioned to Dr. German that he (Dr. Ford) thought it unlikely that Mr. Dobkin had ever had bladder cancer because he still had his bladder. . . .*"

See July 8, 1993 Fox Memorandum, Exhibits to Memoranda of Hopkins Defendants for Summary Judgment, Exh. 49 ("Fox Memorandum"). Subsequently, although unclear when, Dr. German crossed out the last part of the above underlined statement and wrote in the margin that Dr. Ford informed her "that it was not clear what type of cancer Mr. Dobkin had

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23. Indeed, this is consistent with Dr. German's deposition testimony:

Q. Did Mr. Dobkin ever make any sexual gestures toward you?

A. Not sexual, no.

Q. Did he make any gestures towards you other than sitting in his chair in such a way that you thought was threatening that made you think he wanted to communicate with you in a sexual way?

A. No.

Q. Did Mr. Dobkin ever expose himself to you?

A. Yes.

See German Deposition, at 468.

since he still had his bladder." *See* Edited Version of July 8, 1993 Fox Memorandum, Hopkins' Reply to Motion for Summary Judgment, Exhibit 6.

Dr. German's statement to Ms. Fox was conditionally privileged. At the time Dr. German made the statement, the undisputed evidence establishes that Ms. Fox was conducting an investigation concerning Mr. Dobkin. Dr. German reported the above in response to questioning from Ms. Fox. *See* Fox Memorandum. Thus, Dr. German was reasonable in her belief that Ms. Fox was someone to whom she had an obligation to report the matter; indeed, Mr. Dobkin does not argue to the contrary. Because conditional privileges apply to Dr. German's statement, Mr. Dobkin must show Dr. German acted with malice in relating the statement to Ms. Fox.

Citing to the deposition testimony of Dr. German and Dr. Ford, Mr. Dobkin highlights some contradictions that he believes create a material issue of fact. In her deposition, Dr. German first testified that she "never talked about Mr. Dobkin" with Dr. Ford. *See* German Deposition, at 215. The next session, however, Dr. German stated that she had been mistaken and "Dr. Ford said . . . I doubt that [Mr. Dobkin] ever had bladder cancer." *Id.*, at 284-285. When asked whether she knew the basis for Dr. Ford's alleged statement concerning his "doubt" that Mr. Dobkin had bladder cancer, Dr. German did not have an answer. *Id.* In fact, Dr. German claims that she never asked Dr. Ford such a question. *Id.*, at 292. According to the Fox Memorandum, however, Dr. German informed Ms. Fox that Dr. Ford explained his doubts arose out of the fact Mr. Dobkin "still had his bladder." *See* Fox Memorandum.

In parts of his deposition, Dr. Ford claims to have no recollection of ever discussing Mr. Dobkin's bladder cancer with Dr. German . *See* Deposition of Dr. Daniel Ford, Exhibits to Memoranda of The Hopkins Defendants for Summary Judgment, Exh. 20 ("Ford Deposition"), at 71-72. But Dr. Ford does state that a discussion of the bladder cancer issue may have arisen with Dr. German "as part of the general comments about how's [Mr. Dobkin] doing or do you think that's going to be a problem or does [Mr. Dobkin] have to go back

to New York for treatment or something like that." *Id.* Further, concerning Mr. Dobkin's diagnosis of bladder cancer, Dr. Ford testified: "I did not know exactly what was going on. My belief is that he probably had, again, a bladder polyp, something superficial, they removed it, and why he was requiring so many cystoscopies for surveillance, I had no idea. It seemed extremely unusual." *Id.*

Mr. Dobkin's charge that Dr. German had knowledge of the falsity of her statement does not stand up under scrutiny. At the time Dr. German made the statement, there was some confusion as to the type of bladder cancer from which Mr. Dobkin suffered. Indeed, Dr. Ford coined Mr. Dobkin's cancer as "superficial bladder cancer," distinguishing it from "bladder cancer that was invasive that would have led to, say, a bladder removal or something like that." Ford Deposition, at 25. Further, Mr. Dobkin recognizes that, upon receipt of her copy of the memorandum, Dr. German crossed out a portion of the Fox memorandum that stated Dr. Ford "thought it unlikely that Mr. Dobkin had ever had bladder cancer" and wrote "that it was not clear what type of cancer Dobkin had since he still had his bladder." *See* Revised Fox Memorandum. Dr. German also reported the correction to Ms. Fox. *See* Deposition of Robin Fox, Exhibits to Memoranda of The Hopkins Defendants for Summary Judgment, Exh. 18, at 78 ("I'm quite certain that she called me . . . to rag that I had misstated something . . .").

The Court finds Dr. German's statement to be consistent with Dr. Ford's deposition testimony concerning the unusual nature of Mr. Dobkin's bladder cancer. Contrary to Mr. Dobkin's contentions, Dr. Ford's testimony does not support his claim that Dr. German made this statement with reckless disregard for its truth. Nothing referred to by Mr. Dobkin indicates an awareness by Dr. German of the probable falsity

of her statement.[24] While her statement, speaking in absolute precision, is arguably incorrect, it does not rise to the level of deliberate falsification.

Because Mr. Dobkin has failed to set forth specific facts indicating constitutional actual malice on the part of Dr. German with respect to the alleged statements charged against her, Dr. German is entitled to summary judgment on Mr. Dobkin's claim for defamation.

2. **Estelle Fishbein**

Mr. Dobkin contends three separate statements allegedly made by Ms. Fishbein were defamatory. First, Mr. Dobkin focuses on the conversation between Ms. Fishbein and his former counsel, Andrew Graham, concerning the alleged exposure episode that took place between Dr. German and Mr. Dobkin. Again, Mr. Graham learned of the incident between Dr. German and Mr. Dobkin through Ms. Fishbein. And, according to Mr. Graham's deposition testimony, Ms. Fishbein told him that Mr. Dobkin "sexually harassed Dr. German." *See* Graham Deposition, at 29-30.

The Court will not permit Mr. Dobkin to rely on Mr. Graham's testimony to support his defamation claim against Ms. Fishbein. Earlier in this litigation, in response to a request by Hopkins to compel production of Mr. Graham's file, former counsel for Mr. Dobkin expressly stated that Mr. Dobkin "has not claimed and does not have any intention of asserting that he was damaged in the eyes of his former attorney [Mr. Graham]," and stressed that Mr. Dobkin does not intend to rely "upon Mr. Graham to establish that Ms. Fishbein's remarks to him were, in a legal sense, defamatory." *See* Dobkin's Opposition to Motion to Compel, Paper No. 60, at 6-7.

Further, in a hearing before Chief Magistrate Judge Goetz, counsel for Mr. Dobkin again emphasized that "we are not relying upon any damages in Mr. Graham's eyes. . . . *See* 3/25/94 Transcript, Hopkins' Reply Memorandum, Exh. 58, at

24. Mr. Dobkin submits records dated October 28, 1993 diagnosing Mr. Dobkin with "Grade 1 well differentiated urothelial bladder carnimona." *See* Exh. 7 to Dobkin Aff. This diagnosis was made after Dr. German made the statement at issue.

62. Based on the numerous assurances from Mr. Dobkin's counsel, Magistrate Judge Goetz limited Hopkins' ability to discover further information concerning Mr. Graham's opinions. *See* Paper No. 63. As it would be extremely prejudicial, the Court will not allow Mr. Dobkin to now rely on Mr. Graham's testimony to support his defamation claim against Ms. Fishbein.

Mr. Dobkin next relies on statements made by Ms. Fishbein in a July 7, 1993 letter from Ms. Fishbein to David Frulla, former counsel for Mr. Dobkin. In the letter, Ms. Fishbein informed Mr. Frulla of her belief that he and his firm had "a legal duty to warn any person, including Dr. German and myself, if any contact with your client leads to a reasonable belief that he is inclined to commit a violent act against that person." *See* Fishbein Letter of 7/7/93, Exhibits to Hopkins Defendants Motion for Summary Judgment, Exh. 17. Copies of the letter were sent to Ms. Fishbein's clients; namely, Dean Zeger, Dr. German, and Hopkins Vice President Ross Jones.[25]

Claiming the letter clearly implies that he has a potential to commit a violent act, Mr. Dobkin contends Ms. Fishbein's statements in the letter constitute actionable defamation. The Court disagrees. The letter concerns the subjective impression of Ms. Fishben and her clients. A statement generally is actionable only when it contains or implies a statement of probable false fact. *See, e.g., Chapin v. Knight-Ridder Inc.*, 993 F.2d 1087. 1093 (4th Cir. 1993) ("Though opinion *per se* is not immune from a suit for libel, a statement is not actionable unless it asserts a provably false fact or factual connotation.") The challenged statements in the July 7, 1993 letter cannot be reasonably interpreted as stating actual facts about Mr. Dobkin. Nothing in the letter can be proven false; indeed, the letter states accurate information concerning the obligations of Mr. Frulla. For these reasons, the letter and statements contained therein are not actionable as defamatory.[26]

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25. A copy of the letter was also faxed to Dr. Phyllis Eveleth of the NIH. Apparently, individuals at NIH had voiced their concerns to Dr. German regarding the safety of Hopkins personnel. *See* Fishbein Declaration, Hopkins Defendants' Reply Memorandum, Exh. 4, at ¶ 9.

26. Based on the foregoing, the Court need not decide whether Ms.

Next, Mr. Dobkin claims Ms. Fishbein misinformed her son, Rand Fishbein, that Mr. Dobkin went to Yale and University of California at San Francisco ("UCSF"), two of the universities where the "Unabomber" had struck. Aside from this statement, Mr. Dobkin proffers no other evidentiary support for his claim that Ms. Fishbein attempted to create a correlation between the Unabomber and himself. As for the statement Ms. Fishbein made to her son, the statement is substantially accurate: Mr. Dobkin received a masters degree from Yale University, and, although he did not formally attend, Mr. Dobkin applied for admission to UCSF. Mr. Dobkin has not demonstrated that Ms. Fishbein's statements were more than simply imprecise. Where, as here, the truth is so close to the facts, the Court finds no legal harm has been done. *See Aids Counseling & Testing Centers v. Group W Television*, 903 F.2d 1000, 1004 (4th Cir. 1990) ("If the gist or 'sting' of a statement is substantially true, 'minor inaccuracies will not give rise to a defamation claim.' ") (internal citation omitted).

Finally, Mr. Dobkin alleges Ms. Fishbein defamed him by telling her son that Mr. Dobkin might be dangerous. Ms. Fishbein concedes voicing to her son the concerns she had for the safety of Dr. German, herself, and other Hopkins personnel. This concern apparently arose after Dr. Suzman of the NIA called Dr. German regarding the letters Mr. Dobkin and his parents wrote to various prominent individuals, which NIA perceived as threatening to Dr. German and other Hopkins staff. *See* German Deposition, at 477-78. To obtain copies of the letters written by Mr. Dobkin and his parents, in addition to making a FOIA request, Ms. Fishbein asked her son for assistance. In seeking the documents, *Rand Fishbein*, not Ms. Fishbein, reported to a representative of then-Congressman Dean Gallo that Mr. Dobkin "might" be "dangerous poten-

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NOTES *(Continued)*

Fishbein's statements in the letter are absolutely privileged. *See Odyniec v. Schneider*, 322 Md. 520, 526-27 (1991) (recognizing the existence of an absolute privilege for defamatory utterances made during the course of judicial proceedings or contained in documents directly related to such proceedings).

tially." *See* Rand Deposition, Dobkin Response to Motion for Summary Judgment, Exh. 10 ("Rand Deposition"), at 92-93.

Mr. Dobkin's attempt to hold Ms. Fishbein responsible for a statement made by her son is misplaced. There is nothing in the record before the Court indicating Ms. Fishbein informed her son Mr. Dobkin was potentially dangerous. Rand Fishbein does not contend his mother referred to Mr. Dobkin as dangerous; in fact, Rand Fishbein testified that his mother did not relate any events to him indicating that Mr. Dobkin might do somebody some harm. *See* Deposition of Rand Fishbein, Hopkins, Motion for Summary Judgment, Exh. 6 at 33. At most, it appears Ms. Fishbein informed Rand of the alleged contents of the letters written by Mr. Dobkin and his parents. According to Rand's testimony, this knowledge lead him to make his own conclusion that Mr. Dobkin might be potentially dangerous. *See* Rand Deposition, at 92 ("[T]he letters appear[] to contain language that in tone and content might have posed a threat, and I did not characterize it beyond that as best as I can recall."). Mr. Dobkin has not provided any evidence that Rand Fishbein's statement that Mr. Dobkin "might" be "dangerous potentially" came from anything his mother specifically told him.

For the above stated reasons, Mr. Dobkin has failed to demonstrate Ms. Fishbein made any statement that can be characterized as defamatory or false. Accordingly, the Court will grant Ms. Fishbein's Motion for Summary Judgment as to Mr. Dobkin's claim for defamation.

3. **Rand Fishbein**

Mr. Dobkin's claim against Rand Fishbein concerns a conversation between Mr. Fishbein and Ms. Molly Singerling, an aide in the office of then-Congressman Dean Gallo, who was assisting Mr. Fishbein in his efforts to obtain the letters written by Mr. Dobkin and his parents. In his complaint against Rand Fishbein, Mr. Dobkin contends that "on or about the 15th day of July, 1993," Rand Fishbein said to "one or more members of the staff of one or more members of the United States Congress" that " '[Mr. Dobkin] is dangerous and is going around threatening violence against my mother.' " *See* Complaint against Rand Fishbein, ¶¶ 7,8.

Initially, Mr. Dobkin claimed he learned of the conversation between Rand Fishbein and Ms. Singerling after speaking with Ms. Singerling on the phone in mid-July 1993. Upon review of the phone records, however, Chief Magistrate Judge Goetz found no indication the call was made. *See* Judge Goetz letter, Hopkins' Motion for Summary Judgment, Exh. 61. Now, in his Reply Memorandum, Mr. Dobkin claims his counsel, Mr. Frulla, informed him of Ms. Singerling's statements on July 19, 1993, four days after Ms. Singerling telephoned Mr. Frulla. *See* Dobkin Memorandum in Opposition to Defendant's Motion for Summary Judgment, at 31; Dobkin Aff., at 24.

Claiming Mr. Dobkin's action against him was untimely filed, Rand Fishbein argues summary judgment is warranted. Under Maryland law, a defamation action must be filed within one year from the date on which it accrues. *See* Md. Cts. & Jud. Proc. Code Ann. §5-105. The uncontested evidence establishes that Rand Fishbein spoke with Ms. Singerling about obtaining the letters written by Mr. Dobkin and his parents on June 28, 1993. *See* 6/28/93 Telephone Message Slip from Congressman Gallo's Office, Exhibits to Memoranda of The Hopkins Defendants for Summary Judgment, Exh. 53; Deposition of Molly Singerling, Exhibits to Memoranda of The Hopkins Defendants for Summary Judgment, Exh. 11 ("Singerling Deposition"), at 46-47. Ms. Singerling contends she called Mr. Frulla on June 28, 1993, the same day she heard from Rand Fishbein. *See* Singerling Deposition, at 46-47. However, Mr. Dobkin maintains that Mr. Singerling spoke with Mr. Frulla on July 15, 1993. *See* Dobkin Aff., at ¶ 24.

Based on the above, even if the Court were to accept Mr. Fishbein's argument that notice to Mr. Dobkin's then attorney, David Frulla, constitutes notice to Mr. Dobkin for tolling purposes, the Court finds there exists a factual issue regarding when Mr. Frulla discovered the facts concerning Rand Fishbein's statements to Ms. Singerling. Summary Judgment is thus precluded on the basis of limitations.

Nevertheless, the Court finds Mr. Dobkin has failed to state an actionable defamation claim against Rand Fishbein. From her conversation with Rand Fishbein, Ms. Singerling can

only recollect that Rand Fishbein expressed concern for his mother's safety. *See* Singerling Deposition, at 37. Mr. Dobkin seemingly concedes that there is nothing defamatory about expressing such concern. And the deposition of Mr. Frulla, in which Mr. Frulla claims Ms. Singerling told him that Rand Fishbein described Mr. Dobkin as unbalanced and dangerous, *see* Deposition of David Frulla, Dobkin Response to Hopkins Defendants' Motion for Summary Judgment, Exh. 11 ("Frulla Deposition"), at 36, is inadmissible hearsay. Evidence of this type may not be relied on to support an opposition to a motion for summary judgment. *See* Fed. R. Civ. P. 56(e); *see also Greensboro Professional Fire Fighters Ass'n v. Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995).

Thus, the only evidence before the Court in support of Mr. Dobkin's defamation claim against Rand Fishbein consists of Rand Fishbein's own statement in his deposition that "[Mr. Dobkin] might be dangerous potentially." Rand Deposition, at 92-93. For several reasons, this statement is nonactionable. First, this-statement constitutes an opinion and cannot be proven false. Second, by this statement, Rand Fishbein did not intimate that Mr. Dobkin is violent. Rather, from the testimony as a whole, it is clear Rand Fishbein noted that the letters written by Mr. Dobkin indicated such a possibility. Mr. Dobkin does not dispute that he wrote letters containing strong language to several public figures. Nor does Mr. Dobkin refute the other basis proffered by Mr. Fishbein in support of his belief that Mr. Dobkin's might be potentially dangerous. *See* Motion of Rand Fishbein for Summary Judgment, at 24-25.

Finally, and most importantly, Ms. Singerling's opinion of Mr. Dobkin did not change as a result of her conversation with Rand Fishbein. *See* Singerling Deposition, at 75. Without any evidence that the recipient of the statement understood it to be defamatory, Mr. Dobkin's claim against Rand Fishbein for defamation must fail. *See Crowley v. Fox Broadcasting Co.*, 851 F. Supp. 700, 702 (D. Md. 1994) (" 'The usual test applied to determine the meaning of a defamatory utterance is whether it was reasonably understood by the recipient of the

communication to have been intended in the defamatory sense.") (*quoting* F. Harper, et al., *The Law of Torts* § 5.4 (1986)).

Based on the evidence before the Court, as a matter of law, Mr. Fishbein's statement that Mr. Dobkin "might" be dangerous potentially was not defamatory. Accordingly, the Court will grant Rand Fishbein's motion for summary judgment.[27]

B. False Light Invasion of Privacy

In Count Three of his amended complaint, Mr. Dobkin alleges a false light invasion of privacy claim against JHU, Dr. German, and Ms. Fishbein. In addressing this claim in their arguments, the parties essentially reiterate their contentions concerning Mr. Dobkin's claim of defamation, and in addition dispute whether Defendants supposed conduct subjected Mr. Dobkin to publicity, opposed to merely publication.

In Maryland, the elements of a claim of false light invasion of privacy are: (1) publicity in a false light before the public; (2) which a reasonable person would find highly offensive; and (3) that the actor had knowledge of or acted in reckless disregard of the publicized matter placing plaintiff in a false light. *Hollander v. Lubow*, 277 Md. 47, 55 (1976) (adopting present Restatement (Second) of Torts § 652E). As this definition demonstrates, a defendant in a false light case is entitled to judgment as a matter of law, as in a defamation case, where the statement is true. *See* §652E, comment a, at 395. Similarly, the qualified privileges applicable in a defamation claim preclude a false light claim absent a showing of actual malice. *Harnish v. Herald Mail Co.*, 264 Md. 326 (1972); Restatement (Second) of Torts § 652G, comment (a).

The Fourth Circuit, interpreting Maryland law, has refused to allow a claim for false light invasion of privacy to stand where the claim failed to meet the standards for defamation. *See AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1004 n.1 (4th Cir. 1990) (*citing*

27. Because Mr. Dobkin has not stated an actionable claim for defamation against any of the individual Hopkins defendants, his claim against JHU for defamation will be dismissed.

Phillips v. Washington Magazine. Inc., 58 Md.App. 30, 36 n. 1, *cert. denied*, 300 Md. 89 (1984)). Thus, based on the same reasoning applied to Mr. Dobkin's claims for defamation, the Court concludes that Mr. Dobkin cannot in this case proceed to trial on a claim of false light invasion of privacy against JHU, Dr. German or Ms. Fishbein. Additionally, Mr. Dobkin has failed to proffer any evidence demonstrating the wide spread dissemination of the statement necessary to state a claim for false light invasion of privacy. Mr. Dobkin cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support his claim. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986). Accordingly, Mr. Dobkin's claims for false light invasion of privacy will be dismissed.

C. Breach of Contract

Asserting that he was wrongfully denied a masters degree in public health (M.P.H.) from JHU, Mr. Dobkin asserts a breach of contract claim against JHU in Count Four of his amended complaint. Although Mr. Dobkin concedes that while at JHU he was a doctoral, not masters, degree student, he contends that JHU breached its contractual obligations to award him a M.P.H. degree because he successfully completed the degree requirements and paid the contract with JHU is his duty to comply with JHU's rules and regulations concerning a M.P.H. degree. This is especially true regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue a career in that area. Here, aside from his own conclusory allegations, Mr. Dobkin submits no evidence establishing that he completed the core curriculum courses necessary to earn the award of an M.P.H. degree, or took the required credits as a matriculated M.P.H. degree candidate. Although Dr. German allowed Mr. Dobkin to waive several course credits before entering the doctoral degree program, he provides nothing demonstrating such credits would have been waived before entering the separate M.P.H. program. Indeed, the record before the Court establishes the opposite. *See* Affidavit of Scott Zeger, Senior Associate Dean for Academic

Affairs for Hopkins' School of Hygiene and Public Health, Hopkins Defendants' Reply Memorandum, Exh. 15, at 2.

Viewing the evidence in the light most favorable to Mr. Dobkin, as the Court must on summary judgment, Mr. Dobkin has failed to set forth any evidence of an express or implied contract with JHU to award him an M.P.H. degree. At this stage in the proceedings, the lack of substance proffered by Mr. Dobkin cannot be remedied by the factual allegations and arguments contained in his response motion. Accordingly, the Court will grant JHU's motion for summary judgment on Mr. Dobkin's breach of contract claim.

D. Tortious Interference with Contract

In Count Six of his amended complaint, Mr. Dobkin brings a tortious interference with contract claim against Dr. German, Ms. Fishbein, and Dr. Kasper, alleging these individuals deliberately sabotaged and interfered with "the contractual relationship between himself, Hopkins and the NIA and or NIH." *See* Amended Complaint, ¶¶ 179-180. The Court, however, previously found that, in accordance with *United States v. Van Horn*, 20 F.3d 104 (4th Cir. 1994), the traineeship relationship under the NRSA arrangement between the parties was statutory, not contractual. *See* January 19, 1995 Memorandum Opinion, Paper No. 101. Because no contractual relationship existed, there can be no claim under Maryland law for tortious interference with contract. *See Travelers Indem. Co. v. Merling*, 326 Md. 329 (1992) (setting forth elements of tortious interference with contract claim). The Court will therefore grant the motions for summary judgment on this claim filed by Dr. German, Ms. Fishbein, and Dr. Kasper.

II. THE DOBKINS' MOTION FOR SUMMARY JUDGMENT

Relying on several letters written by Mr. Dobkin and his parents to private individuals, agencies and public officials, Defendants JHU, Dr. German and Ms. Fishbein filed a counterclaim for defamation against Mr. Dobkin in the original

action, and a separate suit for defamation against Mr. Dobkin's parents, Donald and Rosalyn Dobkin.

In their motions for summary judgment, Mr. Dobkin and his parents first contend that the statements contained in the letters at issue are classic examples of rhetorical hyperbole and therefore not actionable. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (precluding recovery under state emotional distress action for ad parody that "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (finding use of the word "traitor" in literary definition of a union "scab" not basis for defamation action since was merely "a lusty and imaginative expression"). After reviewing the letters, however, the Court finds that a reasonable factfinder could conclude that the statements contained therein imply that Dr. German and Ms. Fishbein acted illegally. The letters do not use the sort of loose, figurative or hyperbolic language that negates the possibility of wrongdoing. Because Mr. Dobkin and his parents statements go beyond hyperbolic statements or opinion, the Court will not dismiss Dr. German and Ms. Fishbein's cause of action on this ground.

Next, arguing the letters were part of their First Amendment right to petition the government for redress of their grievances, Mr. Dobkin and his parents claim their statements in the letters at issue were privileged. Therefore, according to Mr. Dobkin and his parents, the Counter-plaintiffs must demonstrate the letters were written with actual malice to survive summary judgment.

The Petition Clause of the First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. I.[28] In *McDonald*,

28. The Court notes that the letter written to Hillary Clinton is not a "petition", as Mrs. Clinton is not a government official. Similarly, the letters written by Mr. Dobkin to Dr. Thomas Sowell, William Kunstler and Ross Perot, none of whom are government officials, are not covered by the Petition Clause. These four letters did not concern the passage and enforcement of law, as Mr. Dobkin and his parents contend, and did not address a matter of public concern.

v. Smith, 472 U.S. 479 (1985), the Court refused to afford absolute immunity to a defendant charged with defaming the plaintiff in a letter about the plaintiff written to the President of the United States. According to the Court, even one who petitions the government may be answerable in libel for defamatory communications if he is shown to have acted with actual malice. *McDonald*, 472 U.S. at 485 ("The right to petition is guaranteed; the right to commit libel with impunity is not.").

The scope of *McDonald* is unclear. The defamation plaintiff in *McDonald*, an unsuccessful aspirant for appointment as United States Attorney, would qualify as a public figure, and his qualification for office, a matter of public concern, was at issue. Under general First Amendment doctrine, a public figure must show actual malice to recover even compensatory defamation damages. *Batson v. Shiflett*, 325 Md. 684, 722 (1992) (*quoting New York Times v. Sullivan*, 376 U.S. at 279-280). The *McDonald* Court gave no indication whether either the plaintiff's public figure status or the public concern at issue was relevant to its holding. The Court, however, emphasized that the rights of speech, press, assembly and petitioning should be treated the same under the First Amendment. *McDonald*, 472 U.S. at 485 ("[T]here is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."); *see also Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) (noting that "the Petition Clause does not enjoy a special status among the First Amendment guarantees").

With the above principles in mind, the Court concludes that the protection of the *New York Times* actual malice standard is not applicable whenever the right to petition is exercised. *See In re IBP Confidential Business Documents Litigation*, 800 F.2d 787, 788 (8th Cir. 1986) (finding "first amendment petitioning is protected by the same constitutional principles identified by the Supreme Court as applicable in other cases involving defamatory first amendment speech"), *cert. denied*, 479 U.S. 1088 (1987). Rather, in accordance with First Amendment free speech jurisprudence, only if the

Counter-plaintiffs qualify as public figures must they demonstrate actual malice to survive summary judgment.

There are two classes of public figures that have been identified by the Supreme Court: general purpose and limited purpose public figures. "In some instances an individual may achieve such fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Robert Welch. Inc.*, 418 U.S. 323, 351 (1974). Whether, and for what purposes, a person is a public figure is a matter of law for the court to decide. *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

JHU seemingly concedes it is a public figure plaintiff. Focusing on the positions Dr. German and Ms. Fishbein hold at JHU, Mr. Dobkin and his parents argue Dr. German and Ms. Fishbein qualify as limited purpose public figures. The Court disagrees. *Gertz* establishes a two-part analysis to determine whether an individual is a limited purpose public figure: whether there was a particular "public controversy" that gave rise to the alleged defamation, and whether the "nature and extent of [the] individual's participation" in that particular controversy is sufficient to justify public figure status. 418 U.S. at 352; *see also Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994).

In the case at hand, there is no particular public controversy that gave rise to the alleged defamation. Adopting the definition of public controversy as espoused by the Court of Appeals for the District of Columbia Circuit, the Fourth Circuit has held:

> A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way . . . . [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention. . . . Rather, a public controversy is a dispute that in fact received public attention

> because its ramifications will be felt by persons who are not direct participants.

Foretich, 37 F.3d at 1554 (quoting *Waldbaum v. Fairchild Publications. Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980)). The dispute between Mr. Dobkin and the requisite tuition and fees. *See* Amended Complaint, at ¶¶ 165-166.

This is not a situation where JHU has refused to confer on Mr. Dobkin that which it expressly promised. Mr. Dobkin only applied to and was admitted into the doctoral, not masters, degree program. Moreover, Mr. Dobkin has not provided any evidence, such as the university's bulletins or guidelines, demonstrating that the parties entered into an implied contract that, if Mr. Dobkin completed the required courses and paid the necessary tuition, JHU would award him a masters degree even though he did not initially seek such a degree.

In his response motion, Mr. Dobkin relies on the Court's earlier statement, made in the context of a motion to dismiss, that the viability of Mr. Dobkin's breach of contract claim was a factual question. At the summary judgment stage, however, Mr. Dobkin cannot merely rest on his allegations; again, he must make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1985). Failure to bring forth any evidence raising a genuine issue of fact concerning the existence of a contract, express or implied, between the parties, mandates the entry of summary judgment on Mr. Dobkin's breach of contract claim against JHU.

Further, even assuming the Court were to find the existence of a contract between JHU and Mr. Dobkin, Mr. Dobkin did not fulfill the requirements of the M.P.H. degree, and thus, breached his part of the contract. Implicit in Mr. Dobkin's supposed educational Hopkins Defendants does not have ramifications for individuals beyond its immediate participants. Indeed, the issues solely involve the termination of Mr. Dobkin's training grant and alleged statements made during and after Mr. Dobkin's time at the Hopkins University. Clearly, the impact of this controversy is felt by no one but the

parties to this action. Accordingly, as a matter of law, Dr. German and Ms. Fishbein are not public figures.

As private individuals, Ms. Fishbein and Dr. German do not need to prove Mr. Dobkin and his parents acted with actual malice; rather, they can recover by showing Mr. Dobkin and his parents negligently published a defamatory falsehood. *See Gertz,* 418 U.S. at 345 (refusing to apply "actual malice" standard to private individuals seeking to recover compensatory damages). Upon review of the letters, the Court finds Ms. Fishbein and Dr. German have raised serious issues of fact as to whether the statements made by Donald and Rosalyn Dobkin in the letters to Vice-President Gore, Senator Dole, and Hillary Clinton were defamatory. Similarly, Dr. German and Ms. Fishbein raise genuine issues of fact as to whether the statements made by Mr. Dobkin in his letters to Dr. Sowell, Mr. Perot, and Mr. Kunstler constitute defamatory matter. Thus, the Court will deny Mr. Dobkin and his parents motions for summary judgment on Ms. Fishbein and Dr. German's defamation claim.

As a public figure plaintiff, however, JHU must demonstrate Mr. Dobkin and his parents made the statements contained in the letters with "actual malice—that is, with knowledge that their statements were false or with reckless disregard of whether it was false or not. *New York Times*, 376 U.S. at 279-280. Again, negligence does not suffice; instead, JHU must demonstrate that the Mr. Dobkin and his parents "in fact entertained serious doubts as to the truth of [their] publication," *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968), or "acted with a high degree of awareness of probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964). The Court has emphasized that actual malice standard "should not be confused with the concept of malice as an evil intent or a motive arising from spite or will." *Manson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

Analyzing the evidence presented in the summary judgment record in the light most favorable to JHU, the Court finds a rational finder of fact could not find JHU has demonstrated actual malice by clear and convincing evidence. The testimony before the Court shows Mr. Dobkin and his parents

may have lacked a reasonable basis for their statements, but actual malice cannot be presumed; it is a subjective standard that is not met by evidence suggesting the publisher lacked a reasonable grounds. *Garrison*, 379 U.S. at 78-79. Rather, the appropriate inquiry is what the publisher actually knew. Although Mr. Dobkin and his parents may have had an evil intent in writing the letters, there is insufficient evidence before the Court that Mr. Dobkin and his parents lacked conviction in their statements or entertained serious doubts as to the truth of their statements concerning JHU. Because JHU has failed to come forward with the requisite clear and convincing evidence demonstrating Mr. Dobkin and his parents seriously doubted the veracity of their statements or acted with reckless disregard of whether their statements were false, the Court will dismiss JHU's defamation counterclaim against Mr. Dobkin and its defamation claim against Donald and Rosalyn Dobkin.

CONCLUSION

As set forth above, the Court will dismiss the remaining counts in Mr. Dobkin's amended complaint, Civil Action No. HAR 93-2228, and Mr. Dobkin's complaint against Rand Fishbein, Civil Action No. HAR 95-813. The Court will also dismiss JHU's counterclaim against Mr. Dobkin in Civil Action No. HAR 93-2228, and JHU's claim against Mr. Dobkin's parents in Civil Action No. HAR 94-2656. The case will proceed to trial on Dr. German's and Ms. Fishbein's defamation counterclaim against Mr. Dobkin in Civil Action No. HAR 93-2228 and their claim against Donald and Rosalyn Dobkin in Civil Action No. HAR 94-2656. It will be so ordered.

April 18, 1996
DATE

/s/ John R. Hargrove
JOHN R. HARGROVE
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT S. DOBKIN,	:	
Plaintiff,	:	Civil Action No. HAR 93-2228
	:	
v.	:	(consolidated with)
	:	
THE JOHNS HOPKINS	:	Civil Action No. HAR 94-2655
UNIVERSITY, ET AL.,	:	Civil Action HAR No. 95-813
Defendants.	:	

ORDER

For the reasons set forth in the attached Memorandum Opinion IT IS this 17th day of April, 1996, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendant Johns Hopkins University's Motion for Summary Judgment in Civil Action No. HAR 93-2228 BE, and the same hereby IS, GRANTED;

2. That Defendant Estelle Fishbein's Motion for Summary Judgment in Civil Action No. HAR 93-2228 BE, and the same hereby IS, GRANTED;

3. That Defendant Dr. Pearl German's Motion for Summary Judgment in Civil Action No. HAR 93-2228, BE, and the same hereby IS, GRANTED;

4. That Defendant Dr. Judith Kasper's Motion for Summary Judgment in Civil Action No. HAR 93-2228, BE, and the same hereby IS, GRANTED;

5. That Plaintiff Robert Dobkin's Motion for Summary Judgment on the counterclaim filed by the Johns Hopkins University in Civil Action No. HAR 93-2228 BE, and the same hereby IS, GRANTED;

6. That Plaintiff Robert Dobkin's Motion for Summary Judgment on the counterclaims filed by Dr. Pearl German and Estelle Fishbein in Civil Action No. HAR 93-2228 BE, and the same hereby IS, DENIED;

7. That Defendant Rand Fishbein's Motion for Summary Judgment in Civil Action No. HAR 95-813 BE, and the same hereby IS, GRANTED;

8. That the Clerk of the Court CLOSE Civil Action No. HAR 95-813;

9. That Donald and Rosalyn Dobkin's Motion for Summary Judgment on the claims filed by The Johns Hopkins University in Civil Action No. HAR 94-2656 BE, and the same hereby IS, GRANTED;

10. That Donald and Rosalyn Dobkin's Motion for Summary Judgment on the claims filed by Dr. Pearl German and Estelle Fishbein in Civil Action No. HAR 94-2656 BE, and the same hereby IS, DENIED;

11. That the Clerk of the Court MAIL a copy of this Order and the attached Memorandum Opinion to all parties of record.

/s/ John R. Hargrove

John R. Hargrove
Senior United States District Judge

No. 96-1715, No. 96-1716

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert S. Dobkin,

Plaintiff-Appellant,

v.

Johns Hopkins University, et al.

Defendants-Appellees

June 4, 1997, Argued

January 21, 1999, Decided

Before RUSSELL* and NIEMEYER, Circuit Judges, and TILLEY, United States District Judge for the Middle District of North Carolina, sitting by designation.

PER CURIAM:

After Appellant Robert Dobkin's graduate traineeship grant was terminated at the Johns Hopkins University School of Hygiene and Public Health, Dobkin filed actions against several parties including the University Dr. Pearl German (head of the traineeship program), and Ms. Estelle Fishbein (Vice President and General Counsel for JHU) alleging defamation, false light invasion of privacy, and breach of contract. Prior to filing the action, Dobkin and his parents wrote a number of letters to influential persons castigating Dr. German and Ms. Fishbein who, after Dobkin filed suit against them, counterclaimed against Dobkin for statements made in the letters he wrote. German and Fishbein also filed a separate action against Mr. Dobkin's parents for assertions made in letters the parents had written.

In Mr. Dobkin's defamation action against JHU, Dr. German, and Ms. Fishbein (HAR 93-2228), the district court

*Judge Russell heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. section 46(d).

granted summary judgment in favor of the defendants. The district court denied Mr. Dobkin's motion for summary judgment on Dr. German's and Ms. Fishbein's defamation counterclaim in Civil Action No. HAR 93-2228 and denied Mr. Dobkin's parents motion for summary judgment in HAR 94-2656. The claims of Dr. German and Ms. Fishbein against Mr. Dobkin and his parents were consolidated for a trial which lasted five days and terminated with verdicts in favor of Dr. German and Ms. Fishbein on each of their respective claims.

Mr. Dobkin appeals the adverse summary judgment rulings and appeals from the jury's verdict. We find no error and affirm, primarily based upon the reasoning of the district court.

I.

In early 1990, Robert Dobkin applied to JHU in order to obtain a Ph.D. in Public Health and a certificate in Gerontology within JHU's Interdepartmental Gerontology Program. He was accepted to the School of Hygiene and Public Health and to the Gerontology Program for the 1990-91 academic year and was awarded a National Institute on Aging/National Institutes of Health traineeship grant in gerontology. Dr. German, a gerontology professor and the traineeship grant director, initially served as Dobkin's advisor but problems eventually developed between them, especially when Dr. German advised Dobkin that he was not ready to take the preliminary departmental oral examination.[1] Disregarding Dr. German's advice, Dobkin located another advisor, stood for the examination and failed.

After the failure, Dobkin's grant was terminated. Rather than pay his own tuition and stay in the doctoral program, Dobkin requested that JHU award him a master's degree based on the work he had already undertaken. Ms. Fishbein, Vice President and General Counsel for JHU, became involved in trying to settle the matter of Dobkin's request which JHU ultimately rejected. Dobkin then took leave from the school and eventually withdrew.

1. The parties dispute who terminated the relationship.

Dobkin alleges that during the settlement discussions and ensuing investigation, Dr. German and Ms. Fishbein made statements which he claims were defamatory.

In HAR 93-2228, Dobkin claimed that Dr. German had accused him of sexually harassing her when she made statements to others at JHU that Dobkin had once come to her office wearing shorts of such an extremely short length that, when he sat down, a portion of his private anatomy became exposed. He also claimed that Dr. German had falsely accused him of being untruthful about his medical condition to Robin Fox, the Assistant to the Dean of the School of Hygiene and Public Health at JHU. The alleged defamatory statement was then put in a memo which read as follows:

> While at Hopkins, Mr. Dobkin disclosed to a number of people that he had been earlier diagnosed with cancer of the urinary bladder. In the statement of objective section of his application, he states that he was diagnosed with cancer (type not mentioned) in 1983 and was treated at Sloan Kettering. According to Dr. German, Dr. Dan Ford examined Mr. Dobkin at our Student Health Center and mentioned to Dr. German that he (Dr. Ford) thought it unlikely that Mr. Dobkin had ever had bladder cancer because he still had his bladder.[2]

Dobkin claimed that Ms. Fishbein defamed him by suggesting that he was a dangerous person when she stated in a letter to one of Dobkin's own attorneys that the attorney had "a legal duty to warn any person, including Dr. German and myself, if any contact with your client leads to a reasonable belief that he is inclined to commit a violent act against that person." Dobkin also contends that Ms. Fishbein suggested he might be the Unabomber when she remarked to her son that Dobkin had attended two universities where the Unabomber had struck.

Before seeking judicial relief, Dobkin and his parents, Donald and Rosalyn Dobkin, wrote letters to various persons,

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2. Dr. German later wrote in the margin of the memo that Dr. Ford had told her "that it was not clear what type of cancer Mr. Dobkin had since he still had his bladder."

allegedly to redress t[illegible]ermination of Dobkin's federal traineeship grant. Dobkin se[illegible] letters to Dr. Thomas Sowell[3] of the Hoover Institute at Stanford University, Ross Perot,[4] and William Kunstler. Dobkin's parents wrote letters to Hillary Clinton,[5] Vice-president Al Gore,[6] and Senator Robert Dole.[7] As a result of those assertions, JHU, Dr. German and Ms. Fishbein brought defamation actions against Dobkin (HAR 93-2228) and his parents (HAR 94-2656).

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3. In his letter to Dr. Sowell, Dobkin stated: "I have been annihilated and my research career completely stymied by Johns Hopkins University in a matter involving fraudulent grant administration with the National Institutes of Health." (J.A. at 155-58).

4. In his letter to Mr. Perot, Dobkin stated: "My NIH grant was administered fraudulently by Johns Hopkins, my records were slandered, the NIH now threatens suit against me and refuses to investigate any written allegation of corruption and lies in correspondences and actions by John Hopkins with NIH officials to ruin me." (J.A. at 159-60).

5. In their letter to Hillary Clinton, Mr. and Mrs. Dobkin stated:

> our son, a Yale alumnus (M.P.H. 86), has been academically and apparently irremediably destroyed as a "reward" for his hard work, dedication, integrity and scholarship — the recipient of pre-meditated misconduct, cover-up and fraudulent grant administration at the highest bureaucratic levels of Johns Hopkins University and involving the National Institutes of Health.

(J.A. at 142-49).

6. In their letter to Vice President Gore, Mr. and Mrs. Dobkin stated:

> Last November (with no response to date), we wrote to Hillary Clinton requesting any possible assistance in a matter concerning waste and misuse of government funding (the National Institutes of Health) and the premeditated academic assassination of our son, Robert Dobkin, and subsequent cover up at the Johns Hopkins University School of Hygiene and Public Health.

(J.A. at 150-53).

7. Although there was nothing alleged to be defamatory in the letter to Senator Dole, Mr. and Mrs. Dobkin attached copies of the letters to Hillary Clinton and Vice President Gore. See Letter to Senator Dole. (J.A. at 136).

II.

A. Dobkin v. Johns Hopkins University (Appeal No. 96-1715)

Dobkin contends the district court erred in granting summary judgment to the JHU defendants, specifically JHU, Dr. German, and Ms. Fishbein. He contends (1) that he established genuine issues of fact that Dr. German and Ms. Fishbein (and thus JHU) defamed him by stating that he exposed himself; committed sexual harassment; was not truthful about the state of his health; was psychologically unstable; and posed a danger to the lives and safety of JHU personnel; (2) that he stated an actionable false light claim; and (3) that he stated an actionable breach of contract claim.

Summary judgment is appropriately granted when a party having the burden of proof on a particular claim is unable either to produce admissible evidence or point in the record to admissible evidence which would be sufficient to support a jury verdict on each element of that claim. *Anderson v. Liberty Lobby, Inc.*, 477 US. 242, 248-49, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In considering the motion, the district court must consider the evidence and reasonable inferences to be drawn from the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U. S. 574, 597-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Our review of the district court's finding is de novo. *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1313 (4th Cir. 1993).

To establish defamation in Maryland, a plaintiff must prove "that the defendant made a defamatory statement to a third person; that the statement was false; that the defendant was legally at fault in making the statement; and that the plaintiff thereby suffered harm." *Rosenberg v. Helinski*, 328 Md. 664, 616 A. 2d 866, 871 (Md. 1992), cert. denied, 509 U.S. 924, 125 L. Ed. 2d 727, 113 S. Ct. 3041 (1993). [8] "A defamatory statement is one which tends to expose a person to pub-

8. In a diversity action, the law of the forum state applies. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941); *Fortress Re, Inc. v. Central Nat'l Ins. Co.*, 766 F.2d 163, 165 (4th Cir. 1985).

lic scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or association with, that person." Id. (citations omitted). A communication may be conditionally privileged " 'when the circumstances induce a correct or reasonable belief that the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.' " *Henthorn v. Western Md. Ry. Co.*, 226 Md. 499, 174 A.2d 175, 179 (Md. 1961) (citations omitted). However, a conditional privilege can be overcome by a showing of actual malice. *Marchesi v. Franchino*, 283 Md. 131, 387 A.2d 1129, 1133 (Md. 1978). The standard by which malice is to be measured is " 'knowledge of falsity or reckless disregard for truth.' " Id. (citation omitted). The district judge found that Dobkin did not contest that Dr. German's alleged statement about Dobkin's genitals becoming exposed was conditionally privileged. However, Dobkin contended that the conditional privilege was defeated because Dr. German uttered the statement, knowing it was false or with a reckless disregard for the truth. Dobkin, however, neither presented nor pointed to evidence that Dr. German had described the incident as sexual harassment or had acted recklessly in describing the incident. The district court properly granted summary judgment since there was insufficient evidence of actual malice to create a jury question.

The second statement Mr. Dobkin contends was defamatory was one made by Dr. German to Robin Fox, the Assistant to the Dean of the School of Hygiene and Public Health at JHU, about the state of Dobkin's health. Later, the statement was put in Dobkin's file. The alleged statement appears in a memo written by Robin Fox and reads as follows:

> While at Hopkins, Mr. Dobkin disclosed to a number of people that he had been earlier diagnosed with cancer of the urinary bladder. In the statement of objective section of his application, he states that he was diagnosed with cancer (type not mentioned) in 1983 and was treated at Sloan Kettering. According to Dr. German, Dr. Dan Ford examined Mr. Dobkin at our Student Health Center and

> mentioned to Dr. German that he (Dr. Ford) thought it unlikely that Mr. Dobkin had ever had bladder cancer because he still had his bladder.

Some time later, Dr. German wrote in the margin of the memo that Dr. Ford informed her "that it was not clear what type of cancer Mr. Dobkin had since he still had his bladder." The district judge found that the statement was conditionally privileged because Ms. Fox was conducting an investigation of Mr. Dobkin and Dr. German made the statement in response to questioning from Ms. Fox. The district judge also found that Dobkin failed to set forth specific facts indicating Dr. German acted with actual malice. Therefore, the district judge granted summary judgment for Dr. German on Dobkin's claim for defamation. We agree that Dobkin failed to provide or point to evidence sufficient to create a factual issue regarding either conditional privilege or actual malice and, therefore, we find summary judgment on that claim to have been appropriate.

Next, Dobkin contends that Ms. Fishbein's statements to David Frulla, former counsel for Dobkin, that he and his firm had "a legal duty to warn any person, including Dr. German and myself, if any contact with your client leads to a reasonable belief that he is inclined to commit a violent act against that person" was defamatory. Dobkin further claims that 'Ms. Fishbein's statement to her son, Rand Fishbein, expressly or impliedly stated that Dobkin was dangerous. She allegedly misinformed her son that Dobkin had attended two of the universities where the Unabomber struck. The district court held that the letter to Dobkin's attorney contained the subjective impressions of Ms. Fishbein and her clients. Generally, to be actionable a statement must contain or imply a statement of provable false fact. See e.g., *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) (stating that "though opinion per se is not immune from a suit for libel, a statement is not actionable unless it asserts a provably false fact or factual connotation"). The district judge found the letter could not reasonably be interpreted as stating actual facts about Dobkin. As for the statement to her son, the district judge found that the statement about Dobkin attending two of the universities where the Unabomber struck was substantially accurate,

therefore, no legal harm was done. See *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (noting, that "if the gist or 'sting' of a statement is substantially true, 'minor inaccuracies will not give rise to a defamation claim' "). Again, we agree with the analysis of the district court.

Dobkin next argues that be did state an actionable false light invasion of privacy claim. To state an actionable false light claim, a plaintiff must show: (1) publicity in a false light which a reasonable person would find highly offensive and (2) that the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter placing plaintiff in a false light. See, Restatement (Second) of Torts § 652E; *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 665 A.2d 297 (Md. App. 1995), cert. denied, 341 Md. 172, 669 A.2d 1360 (Md. 1996). As with a defamation claim, qualified privileges preclude a false light claim absent a showing of actual malice. See *Harnish v. Herald-Mail Co.*, 264 Md. 326, 286 A.2d 146 (Md. 1972); Restatement (Second) of Torts § 652G, comment (a). The district court held that, for the same reasons that Dobkin's defamation claims failed, Dobkin's false light claims failed. See *AIDS Counseling & Testing Ctrs.*, 903 F.2d at 1004 n. 1 (citing *Phillips v. Washington Magazine, Inc.*, 58 Md. App. 30, 36 n.1, 472 A.2d 98, 101, cert. denied, 300 Md. 89, 475 A.2d 1201 (1984) and stating that the same considerations and legal standards apply to defamation actions and invasions of privacy actions). Additionally, the district court held that Dobkin failed to proffer any evidence demonstrating widespread dissemination as required to state a false light invasion of privacy claim.

As to the contract claim, the district court found that Dobkin did not put forth any evidence raising a genuine issue of fact concerning an express or implied contract with JHU to award Dobkin a M.P.H. degree. We agree with the district court's reasoning on the false light claim and its finding on the contract claim.

B. Fishbein v. Dobkin (Appeal No. 96-1716)

In this case, Dobkin's motion for summary judgment was denied in part and the case went to trial. The Dobkins contend that the trial judge erred by: (1) not instructing the jury that all of the letters were petitions to the government for redress of their grievances which would be conditionally privileged under the Petition Clause of the First Amendment; (2) the letters were constitutionally protected; and (3) the letters were rhetorical hyperbole. Therefore, the Dobkins argue that Dr. German and Ms. Fishbein had to demonstrate actual malice in order to prevail.

The Petition Clause of the First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. 1. However, the right to petition does not provide absolute immunity to those who express libelous and damaging falsehoods. See *McDonald v. Smith*, 472 U.S. 479, 485, 86 L. Ed. 2d 384, 105 S. Ct. 2787 (1985) (stating that "the right to petition is guaranteed; the right to commit libel with impunity is not"). The Supreme Court stated that "there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than [in] other First Amendment expressions." Id. The Dobkins are not afforded the greater protection of the actual malice standard simply because they argue the petition clause. Rather, in accordance with other defamatory First Amendment cases, only if Dr. German and. Ms. Fishbein qualify as public figures must they prove actual malice. A public figure must show actual malice to recover damages. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). Dr. German and Ms. Fishbein are not public figures either for general purposes or limited purposes. There is a two part inquiry to determine whether a person is a limited purpose public figure: first, whether there was a "public controversy" which gave rise to the alleged defamation and second, whether the "nature and extent of [the] individual's participation" in that controversy justifies public figure status. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52, 41 L. Ed.

2d 789, 94 S. Ct. 2997 (1974), Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir 1994). A "public controversy" has been defined as:

> A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way . . . Essentially private concerns or disagreements do not become public controversies simply because they attract attention. . . . Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.

Foretich, 37 F.3d at 1554 (quoting *Waldbaum v. Fairchild Publications, Inc.*, 201 U.S. App. D.C. 301, 627 F.2d 1287, 1296 (D.C. Cir.), cert. denied, 449 U.S. 898, 66 L. Ed. 2d 128, 101 S. Cr. 266 (1980)). The termination of Robert Dobkin's grant is not a "public controversy." Therefore, Dr. German and Ms. Fishbein are not public figures and did not need to prove the Dobkins acted with actual malice. Furthermore, some of the letters at issue were sent to Hillary Clinton, Thomas Sowell, Ross Perot, and William Kunstler. These individuals were not public officials and letters to them would not qualify as petitioning the government.

Next, the Dobkins claim that the trial court abused its discretion by excluding, certain evidence. "Decisions regarding the admission and exclusion of evidence are peculiarly within the province of the district court, not to be reversed on appeal absent an abuse of discretion." *Martin v. Deiriggi*, 985 F.2d 129, 137 (4th Cir. 1992). First, the Dobkins contend the trial court erred by excluding evidence of their state of mind at the time they wrote and published the statements. The Dobkins argue that hearsay evidence should have been admitted, not to prove the truth of the matter asserted, but as state of mind evidence pursuant to Rule 803(3) of the Federal Rules of Evidence. They state the totality of the circumstances is relevant to determine whether the letters were published with actual malice or negligently. However, Dr. German and Ms. Fishbein did not need to prove actual malice.

The Dobkins also cite as error the district court's exclusion of evidence pertaining to Dr. German's statements about the exposure of Mr. Dobkin's private anatomy and Ms. Fishbein's statements about the Unabomber. As stated earlier, a trial judge has wide discretion in admitting and excluding evidence. See *Gill v. Rollins Protective Servs. Co.*, 836 F.2d 194, 198 (4th Cir. 1987) (stating that "the determination of the relevancy of evidence is generally committed to the sound discretion of the trial judge"). The Dobkins have made no showing why the exclusion of that evidence was relevant to an issue being tried before the jury.

We have carefully reviewed other assignments of error and find they do not merit discussion. The iudgments of the district court are, in all aspects,

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 22, 1999

No. 96-1715
CA-93-2228-HAR
CA-94-2656-HAR
CA-95-813-HAR

ROBERT S. DOBKIN
Plaintiff - Appellant

and
DONALD ERWIN DOBKIN; ROSALYN DOBKIN
Parties in Interest

v.

JOHNS HOPKINS UNIVERSITY; PEARL GERMAN, Individually and as Professor and Program Director of the Interdepartmental Program in Gerontology; ESTELLE A. FISHBEIN, Individually and as Vice President; JUDITH KASPER, Individually and as Associate Professor

Defendants - Appellees

and
JOHNS HOPKINS UNIVERSITY SCHOOL OF HYGIENE AND PUBLIC HEALTH; DEBRA ROTER, Individually and as Associate Professor; DIANE ROWLAND, Individually and as Assistant Professor; NATIONAL INSTITUTES OF HEALTH; THE NATIONAL INSTITUTE ON AGING; RANDY FISHBEIN

Defendants

No. 96-1716
CA-94-2656-HAR
CA-93-2228-HAR
CA-95-813-HAR

ESTELLE A. FISHBEIN; PEARL GERMAN

Plaintiffs - Appellees

and

JOHNS HOPKINS UNIVERSITY

Plaintiff

v.

ROBERT S. DOBKIN; DONALD ERWIN DOBKIN; ROSALYN DOBKIN

Defendants - Appellants

On Petition for Rehearing En Banc

The appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK